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No. 89

No. , Original

In the Supreme Court

OF THE

United States

OCTOBER TERM 1980

STATE OF CALIFORNIA, ex rel.
STATE LANDS COMMISSION,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT IN ORIGINAL ACTION; STATEMENT IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT; COMPLAINT

GEORGE DEUKMEJIAN
Attorney General
N. GREGORY TAYLOR
Assistant Attorney General
BRUCE S. FLUSHMAN
PATRICIA SHEEHAN PETERSON
LINUS MASOUREDIS
Deputy Attorneys General
6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-1152
Attorneys for Plaintiff
State of California

BOWNE-PERNAU WALSH • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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STATE LANDS COMMISSION,
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vs.

UNITED STATES OF AMERICA,
Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT IN ORIGINAL ACTION

The State of California, appearing by its Attorney General, George Deukmejian, respectfully requests leave of the Court to file the Complaint submitted herewith against the United States of America, defendant. The State of California brings this suit under the authority of Article III, section 2 of the Constitution of the United States and 28 U.S.C. section 1251(b).

Respectfully submitted,

GEORGE DEUKMEJIAN
Attorney General

N. GREGORY TAYLOR
Assistant Attorney General

BRUCE S. FLUSHMAN
PATRICIA SHEEHAN PETERSON
LINUS MASOUREDIS
Deputy Attorneys General

By BRUCE S. FLUSHMAN
Deputy Attorney General

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STATE OF CALIFORNIA, ex rel.
STATE LANDS COMMISSION,
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UNITED STATES OF AMERICA,
Defendant.

STATEMENT IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

I

INTRODUCTION; SUMMARY OF ARGUMENT

This case bears directly upon fundamental State's rights—state sovereign land title and the power of a State to apply its own non-discriminatory laws to determine the title to and the boundaries of land within its borders, especially its sovereign lands. These attributes of sovereignty, basic to the federal system, are constitutionally founded in the Tenth Amendment and the Equal-Footing Doctrine, long recognized by the Supreme Court and confirmed by statute.

This case presents no factual contest. It arises because the United States, relying on principles of federal, not state, law, asserts title to land which was indisputably part of the bed of the Pacific Ocean when California was admitted to the Union and plainly belonged to California as part

of its sovereign land heritage. Refusing to honor essential constitutional, statutory and court ratified precepts which require title to such sovereign lands to be determined under state law principles, the United States seeks now to remake the fundamental fabric of federalism and cause a defeasance of state sovereign land title by operation of doctrines of federal law.

This case presents a question wholly legal in character, the applicable choice of law, and warrants original jurisdiction in the Supreme Court. First, before any fact finder can decide this case, the Supreme Court must resolve a claimed conflict in its rulings and determine the applicable choice-of-law. For this reason, California should not be remitted to the tortuous, protracted process of trial and appeal through the federal court system. Second, this Court has instructed that coastal boundary cases such as this should most appropriately be brought as original actions pursuant to Article III, section 2, clause 2 of the Constitution. *United States v. Alaska*, 422 U.S. 184, 186, fn. 2 (1975). Finally, in this conflict between the federal and state sovereigns about the fundamental distribution and exercise of sovereign power, only the Supreme Court can finally ensure that the United States will honor its constitutional and statutory obligations and follow court ratified principles that require the United States to base its boundary and land title claims on state, not federal, law.

Efficient application of governmental and judicial resources, absence of any factual dispute and avoidance of the prolonged process of trial and appeal through the federal court system concerning an issue which ultimately can be decided only by the Supreme Court compel the conclusion that California's Motion for Leave to File Complaint in Original Action should be granted.

II

JURISDICTION

California[1] brings this action against the United States under authority of Article III, section 2 of the Constitution and 28 U.S.C. section 1251(b). The Supreme Court has jurisdiction over suits in equity to determine the boundary between State and federal lands. See *United States v. Texas*, 143 U.S. 621 (1892); *Minnesota v. Hitchcock*, 185 U.S. 373 (1902).

The United States has consented to be sued in civil actions to ". . . adjudicate a disputed title to real property in which the United States claims an interest. . . ." 28 U.S.C. section 2409a(a). The United States' claim of fee title to the contested land falls within this waiver of sovereign immunity.

The Constitution provides for Supreme Court original jurisdiction of suits between the United States and a State. U.S. Const., Art. III, section 2. Although such original jurisdiction is held to be concurrent with jurisdiction of such suits in the lower federal courts, *California v. Arizona*, 440 U.S. 59, 65 (1979); 28 U.S.C. section 1346(f),[2]

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[1]The California State Lands Commission ("Commission") is an administrative agency of the State of California authorized to represent the State of California in all contests between the State of California and the United States in relation to public lands. Cal.Pub.Res. Code sections 6103, 6103.2 and 6210. The Commission is vested with exclusive jurisdiction and authority to administer all public lands, including sovereign tide or submerged lands, owned by the State of California. Cal.Pub.Res. Code sections 6216 and 6301.

[2]Section 1346(f), ". . . by vesting 'exclusive original jurisdiction' of quiet-title actions against the United States in the federal district courts, did no more than assure that such jurisdiction was not conferred upon the courts of any State." *California v. Arizona, supra*, 440 U.S. at 68.

district court jurisdiction does not supplant Supreme Court original jurisdiction and this suit against the United States is properly maintained by California in the Supreme Court. *California v. Arizona, supra,* 440 U.S. at 66-67, 68.

As will be seen, this controversy, wholly legal in character, has been engendered by the dogged refusal of the United States to honor its constitutional and statutory obligations or to follow long recognized and recently reiterated Supreme Court precedent requiring the United States to base its boundary and land title claims on state, not federal, law.

III

BACKGROUND

The State of California, upon admission to the Union, became vested with sovereign title to all lands within its boundaries below the ordinary high-water mark of tidal or navigable waters. *E.g., Pollard's Lessee v. Hagan,* 3 How. 212, 223, 230 (1845); *Weber v. Harbor Commissioners,* 18 Wall. 57, 65-66 (1873); *Packer v. Bird,* 137 U.S. 661, 666 (1891); *Shively v. Bowlby,* 152 U.S. 1, 57 (1894). California acquired these sovereign lands on an "equal footing" with the Original States. *Ibid.*; *Borax, Ltd. v. Los Angeles,* 296 U.S. 10, 15, 22 (1935). The United States had no claim of title to sovereign lands within the 13 Original States nor to sovereign lands within the States created from the territories acquired as the United States continued on its manifest destiny. *E.g., Shively, supra,* 152 U.S. at 57 (1894). In other than the 13 Original States, the United States held title to these sovereign lands only ". . . for the benefit of the whole people, and in trust for the several States to be ultimately created out of the Territor[ies]." *Ibid.* Congress confirmed California's title to these sovereign lands in the Submerged Lands Act. Submerged Lands Act, Act of May 22, 1953, Title II, § 3, 67 Stat. 30, 43 U.S.C. section 1311; *United States v. California,* 381 U.S. 139, 145-146 (1965).

Thus, upon California's admission to the Union on September 9, 1850, California's title to sovereign lands within her borders vis-a-vis the United States was ". . . absolute so far as any federal principle of land titles [was] concerned . . .", *State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 374 (1977) ("Corvallis"), and ". . . complete . . . [,] no power of disposition remain[ing] with the United States." *Borax, Ltd., supra*, 296 U.S. at 19.

IV
FACTS

This case concerns the title to and the boundaries of land located immediately north of the entrance channel to Humboldt Bay, California. In 1854, this land lay seaward of the ordinary high-water mark and was part of the bed of the Pacific Ocean.

No factual dispute exists as to the events which have culminated in this litigation.

The entrance channel to Humboldt Bay from the Pacific Ocean passes between two low sandy peninsulas known as the North Spit and the South Spit. The North Spit, located in both Township 5 North, Range 1 West and Township 4 North, Range 1 West, Humboldt Base and Meridian[3] was surveyed in 1854 by the United States. Township plats were prepared by the United States showing the extent and location of the public lands in these townships. United States Township Plat, T4N, R1W, H.B.M.; United States Township Plat, T5N, R1W, H.B.M.[4] The seaward boun-

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[3]The following abbreviations will be used hereinafter: Township ("T"); Range ("R"); North ("N"); West ("W"); and Humboldt Base and Meridian ("H.B.M.").

[4]Certified copies of these plats are lodged herewith as Exhibit A to the "Exhibits in Support of California's Motion for Leave to File Complaint; Matters of Which Judicial Notice is Requested," here-

dary of both townships was surveyed and closely approximated by the United States as the official meander line[5] of the ordinary highwater mark of the Pacific Ocean, the seaward extent of the public lands of the United States. See, *e.g., Packer, supra*, 137 U.S. at 671-672.

In 1854, the United States township surveys which included the North Spit established that the land that is the subject of this litigation ("subject land") was located seaward of the official United States meander line of the ordinary high-water mark of the Pacific Ocean.[6] Thus, official United States surveys contemporaneous with the admission of California into the Union demonstrate that the subject land was part of the bed of the Pacific Ocean and the sovereign lands of California, owned in fee and held in trust for the people of California. *Supra*, pp. 5-6; see *People v. California Fish Company*, 166 Cal. 576, 584 (1913). The subject land has never been conveyed by California.[7]

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inafter referred to as "Exhibits in Support of Motion." Pursuant to Federal Rule of Evidence 201(d), the Supreme Court is requested to take judicial notice of Exhibit A as containing facts not subject to reasonable dispute.

[5]A meander line runs along the margin of a water course. It is run for the purpose of ascertaining the quantity of public lands bordered by such watercourse and is accomplished to obtain an average result because of the difficulty in following the sinuosities of a water line. The actual boundary is the watercourse. *Hardin v. Jordan*, 140 U.S. 371, 380 (1891); *Mitchell v. Smale*, 140 U.S. 406, 413 (1891).

[6]Exhibit A to the Exhibits in Support of Motion; Complaint, Exhibit B.

[7]Affidavit of Gerald C. Smith, Custodian of Public Records, lodged herewith as Exhibit B to the Exhibits in Support of Motion. Pursuant to Federal Rule of Evidence 201(d), the Supreme Court is requested to take judicial notice of Exhibit B as containing facts not subject to reasonable dispute.

By secretarial orders of 1859 and 1871, certain of the public lands of the United States on the North Spit described in the township plats were reserved from public sale. Secretarial Order, December 27, 1859 (reserving fractional section 6, T4N, R1W, H.B.M.); Secretarial Order, August 19, 1871 (reserving lots 3 and 4, section 31, T5N, R1W, H.B.M.)[8] The lands reserved by the United States on the North Spit are collectively referred to herein as the "Coast Guard Site."

The Pacific Ocean shoreline along the Coast Guard Site remained substantially unchanged from 1854 until the United States began construction of jetties[9] at the entrance

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[8]Certified copies of these Secretarial Orders are lodged herewith as Exhibit C to the Exhibits in Support of Motion. Pursuant to Federal Rule of Evidence 201(d), the Supreme Court is requested to take judicial notice of Exhibit C as containing facts not subject to reasonable dispute.

[9]A detailed report chronicalling the construction activities at the entrance to Humboldt Bay and the progressive mutations of the Pacific Ocean shoreline boundary of the North Spit is found in *U.S. Army Corps of Engineers, San Francisco District, Survey Report on Humboldt Bay, California,* Appendix I, "Shoreline Changes" (February 10, 1950) lodged herewith as Exhibit D to the Exhibits in Support of Motion (hereinafter "Corps Report"). This report summarizes earlier reports made to Congress by the Chief of Engineers, U.S. Army: Report of the Chief of Engineers, U.S. Army 1890-1891, Appendix VV, "Improvement of Humboldt Harbor and Bay, California," p. 3120 *et seq.* ("COE 1891 Report"); Report of the Chief of Engineers, U.S. Army 1892-1893, Appendix UU, "Improvement of Humboldt Harbor and Bay, California," p. 3278 et seq. ("COE 1892 Report"); Chief of Engineers, "Entrance to Humboldt Harbor, California," H.R. Doc. No. 950, 60th Cong., 1st Sess. (1908) ("COE 1908 Report"); Chief of Engineers, "Humboldt Harbor and Bay, Calif.," H.R. Doc. 755, 69th Cong., 2d Sess. (1927) ("COE 1927 Report"); Chief of Engineers, "Humboldt Harbor and Bay, Calif.," H.R. Doc. No. 14, 74th Cong., 1st Sess. (1934) ("COE 1934 Report"); and Chief of Engineers, "Humboldt Bay and Harbor, Calif.," H.R. Doc. No. 11, 75th Cong., 1st Sess. (1936)

to Humboldt Bay.[10] Construction of the jetties commenced on the South and North Spit in 1889 and 1891 respectively.[11] Prior to construction of the jetties, a sandy shoal area had existed along the seaward side of both of the Spits.[12] During the construction period, the shoal area disappeared, as jetty construction interrupted the natural littoral sand transport.[13] Upon completion, the north jetty was a massive work:

> ". . . [having] a total length, including bank protection of 7,500 feet. The crest sloped gradually from 10 to 3 feet above low water for 7,000 feet, and thence gradually to bottom. The crest width was 10 feet and side slopes averaging 2 to 1. . . . The North jetty was not built to full height over its whole length."[14]

The Corps Report concluded that the significant seaward shift of the Pacific Ocean shoreline in the vicinity of the

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("COE 1936 Report"). Pursuant to Federal Rule of Evidence 201(d), the Supreme Court is requested to take judicial notice of those portions of the Corps Report hereinafter cited as containing facts not subject to reasonable dispute. Such facts are generally known within the Northern District of California and are capable of accurate and ready determination by resort to the United States Army Corps of Engineers and published Congressional reports, sources whose accuracy, in this instance, cannot reasonably be questioned.

[10]Exhibit D, Corps Report, para. 9, p. 4.

[11]*Id.* at para. 5, p. 2; para. 6, p. 3; para. 21, p. 8; para. 25, p. 9.

[12]*Id.* at para. 5, p. 2.

[13]*Id.* at para. 6, p. 3; para. 21, p.8.

[14]COE 1908 Report, pp. 7-8. Pursuant to Federal Rule of Evidence 201(d), the Supreme Court is requested to take judicial notice of such portion of COE 1908 Report as containing facts not subject to reasonable dispute. Such facts are generally known within the Northern District of California and are capable of accurate and ready determination by resort to the U.S. Army Corps of Engineers, a source whose accuracy, in this instance, cannot reasonably be questioned.

jetties was caused by the construction of these massive works:[15]

> "With the inauguration of jetty construction in 1890, there began a series of interruptions in normal littoral transport. With each increment in length of the jetties the [Humboldt] bar was pushed seaward. Consequent decrease in offshore depths caused the shore to advance on each side of the inlet . . . Greater advance of the north shore as compared with the south illustrates the effect of dominance of down coast drift during these periods when the jetties were functioning as littoral barriers."[16]

> ". . . [T]he history of shore-line changes prior to jetty construction indicates that the ocean high-water shoreline in the vicinity of Humboldt Bay was geologically stable."[17]

After jetty construction,

> ". . . the Humboldt bar . . . shifted and reformed seaward of its 1870 position, and the ocean high-water shore line along the north spit . . . shifted seaward. The seaward advance of the north spit shore line was most pronounced upon reconstruction of the north jetty in 1917."[18]

Thus, the change in the location of the ordinary high-water mark at the Coast Guard Site resulted from the artificial seaward shift of the shoreline caused by construction of the jetties by the United States.[19] Natural littoral sand transport in this area would not have caused a build-up of

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[15]Exhibit D, Corps Report, *supra*, at paras. 8-16, pp. 3-6.

[16]*Id.* at para. 21, p. 8.

[17]*Id.* at para. 24, p. 9.

[18]*Id.* at para. 25, p. 9.

[19]*Id.* at paras. 8-16, pp. 3-6; para. 21, p. 8; para. 25, pp. 9-10.

the shoreline absent construction of the jetties.[20] It is evident from the Corps Report that no controversy exists between the United States and California about the cause of the movement of the boundary; the jetty caused the movement.[21]

Further, as late as December 1977, the United States recognized California's ownership of the subject land. The United States Coast Guard applied for permission from California to use the subject land to construct a watchtower.[22] The Application and the Environmental Information attached to the Application admit that the site for construction of the watchtower was "[l]ands artificially accreted to Section 6, T4N, R1W"[23] that had been ". . . formed as a result of the North Jetty acting as a barrier to down coast littoral sand movement."[24]

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[20]*Ibid.*

[21]Exhibit B to the Complaint depicts, for illustrative purposes, the present topography of the area in the vicinity of the entrance channel to Humboldt Bay and the location of the Coast Guard Site and the subject land.

[22]Letter, December 21, 1977, A.C. Wagner, Vice Admiral, U.S. Coast Guard, Commander, Twelfth Coast Guard District, to State Lands Commission, attached to which was Application For Permit or Lease of State Lands ("Application") by the United States executed by Vice Admiral Wagner. A certified copy of this letter and the Application is lodged herewith as Exhibit E to the Exhibits in Support of Motion. Pursuant to Federal Rule of Evidence 201(d), the Supreme Court is requested to take judicial notice of Exhibit E as containing facts not subject to reasonable dispute.

[23]Exhibit E, Application, p. 1, para. B.

[24]*Id.*, Application, Environmental Information, U.S. Coast Guard Environmental Assessment, Proposed Construction of Humboldt Bay Coast Guard Station Watchtower (October, 1977), p. (2), para. B.

Based on this application California transmitted a permit for the Coast Guard's execution.[25] In order to expedite the permit process, the permit provided it was without prejudice to either the United States' or California's claim of ownership to any of the subject land.[26] Only after the filing of the application and California's good faith attempt to comply with the United States' request for an expedited permit procedure was California first advised that the United States would dispute the location of the boundary of the Coast Guard Site.[27] Even so, California again attempted to resolve this dispute amicably,[28] but was rebuffed by the United States.[29] California was advised by the United

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[25]Letter, May 19, 1978, James de la Cruz, Land Agent, to U.S. Dept. of Trans., 12th Coast Guard Dist., and attached permit form ("permit"). A certified copy of this letter and permit is lodged herewith as Exhibit F to the Exhibits in Support of Motion. Pursuant to Federal Rule of Evidence 201(d), the Supreme Court is requested to take judicial notice of Exhibit F as containing facts not subject to reasonable dispute.

[26]Exhibit F, Permit, p. 3, para. 1.

[27]Letter, July 17, 1978, William F. Northrop, Executive Officer, States Lands Commission, to Ed Hastey, State Director, Bureau of Land Management. A certified copy of the letter and attachments thereto is lodged herewith as Exhibit G to the Exhibits in Support of Motion. Pursuant to Federal Rule of Evidence 201(d), the Supreme Court is requested to take judicial notice of Exhibit G as containing facts not subject to reasonable dispute.

[28]*Ibid.*

[29]Letter, July 27, 1978, Ed Hastey, State Director, Bureau of Land Management, to William F. Northrop, Executive Officer, State Lands Commission. A certified copy of this letter is lodged herewith as Exhibit H to the Exhibits in Support of Motion. Pursuant to Federal Rule of Evidence 201(d), the Supreme Court is requested to take judicial notice of Exhibit H as containing facts not subject to reasonable dispute.

States Bureau of Land Management that the United States would dispute California's ownership of the subject land based on the "rule" of *Hughes v. Washington*, 389 U.S. 290 (1967) ("Hughes"), that federal law would determine title and boundary questions[30] and would ignore the Supreme Court's mandate in *Corvallis* that state, *not* federal, law would determine such questions.[31] *Corvallis, supra*, 429 U.S. at 371.

The watchtower was completed by the United States without obtaining California's permission.

California has attempted to accommodate the plans of the United States for use of the subject land. In response, the United States has not only challenged California's title and built improvements without obtaining California's permission, but it has also disregarded basic State's rights. Consequently, this action has been necessitated.

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[30]Under federal law principles, accretion, whatever its cause, belongs to the upland owner. See *Beaver v. United States*, 350 F.2d 4 (9th Cir. 1965). There are exceptions to this conclusion. *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 323 (1973); overruled on other grounds, 429 U.S. 363, 382 (1977). Under state law the result is different. In California a distinction is drawn between accretive changes to a boundary caused by natural forces and those caused by the construction of artificial objects. For natural accretive changes, the boundary continues to move as the alluvion is deposited resulting in a benefit to the upland owner. *E.g., City of Los Angeles v. Anderson*, 206 Cal. 662, 667 (1929). Accretion caused by construction of artificial works (jetties, etc.) does not change the boundary which becomes fixed at the ordinary high-water mark at the time the artificial influence is introduced. *E.g., Carpenter v. City of Santa Monica*, 63 Cal.App.2d 772, 794 (1944).

[31]Appendix H.

V

ONLY THE SUPREME COURT CAN PREVENT THE ATTEMPT BY THE UNITED STATES TO RESURRECT THE BONELLI/HUGHES "RULE" THAT WOULD APPLY FEDERAL LAW TO CAUSE DEFEASANCE OF STATE SOVEREIGN LAND TITLE IN COMPLETE DISREGARD OF THE PLAIN MANDATE OF CORVALLIS AND BASIC STATE SOVEREIGN RIGHTS—THE RIGHT OF A STATE TO HAVE TITLE TO ITS SOVEREIGN LANDS DETERMINED PURSUANT TO STATE LAW

The conclusion that the Supreme Court is the proper forum to decide this case is impelled by the facts of the case and the importance of the issues to be decided. Indeed, California could well be subjected to criticism for failure to bring this case in the Supreme Court. See *United States v. Alaska, supra,* 422 U.S. at 186, fn. 2.

First, unlike many original cases sought to be brought before the Supreme Court, *e.g., Mississippi v. Arkansas,* 415 U.S. 289 (1974), this contest centers on the law to be applied to indisputable facts.

Second, the critical facts of this case and *Hughes* are virtually identical. Thus, this case presents a perfect vehicle to make the overruling of *Hughes* manifest and eliminate the manufactured uncertainty created by the United States' continued attempt to revive the recently interred *Bonelli/Hughes* "rule" to defease the State of its sovereign title. Only the Supreme Court can obviate the uncertainty generated by the claimed divergence of its rulings and prevent such defeasance.

Third, in a contest between the United States and a State, where the United States has resolved to ignore the basic sovereign attribute of a State to have the title to and boundaries of its sovereign lands decided by state law, the

Supreme Court is the appropriate forum to determine whether the choice-of-law is state or federal law and, if federal law, whether there is any need to create a nationwide federal rule rather that apply state law as the rule of decision.

A. The Controversy Is Legal, Not Factual

The original jurisdiction of the Supreme Court does not require the Supreme Court to entertain cases necessitating determination of complex facts, rather it is intended to encompass legal controversies presenting substantial questions of law. See *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 503-505 (1971); *United States v. State of California*, 328 F.2d 729, 735-736 (9th Cir. 1964).

In the instant case, the facts are not in controversy. *Supra*, p. 6-13. At issue is which law, state or federal, should be applied to these indisputable facts to determine the effect of the movement of the ambulatory boundary between California's sovereign tide and submerged lands and the Coast Guard Site and, predicated on that law, what is the current location and nature of that boundary.[32] That the questions here are substantial has been noted in an analogous case between the United States and a State about establishment of paramount rights in coastal lands in which it was strongly suggested that original jurisdiction should have been sought. See *United States v. Alaska, supra*, 422 U.S. at 186, fn. 2.

Since this is a coastal boundary case and the choice-of-law determination will not require lengthy or complex factual investigations by the Court, this case is appropriate

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[32]Once the choice-of-law decision is made, the boundary determination itself can be readily resolved through accepted engineering procedures. Either agreement can be reached by the parties, or a special master may be designated to recommend a resolution to the Supreme Court.

for the exercise of original jurisdiction. In addition, as explained below, significant questions of law will be decided in this case.

B. This Case Presents Apposite Facts to Make Explicit the Demise of Hughes and Prevent Continued Attempts to Cause Defeasance of State Sovereign Titles by Operation of Federal Common Law Doctrines

Despite the holding of *Corvallis,* again affirmed by *Wilson, et al. v. Omaha Indian Tribe, et al.,* 442 U.S. 653 (1979) ("Wilson") and by *Montana v. United States,* 101 S.Ct. 1245, 1251 (1981), the United States continues persistently to base land title and boundary claims on federal, not state law, asserting there is some continuing viability of *Hughes.* Not only does this cause considerable uncertainty, but, in this case, it is a blatant effort to cause defeasance of California's sovereign title by application of federal common law principles in disregard of the plain mandate of *Corvallis. Hughes has been overruled implicitly, if not explicitly. Corvallis, supra,* 429 U.S. at 383 (Marshall, J., dissenting). This case, in which the facts and issues are essentially identical to those in *Hughes,* a change in the boundary of coastal lands title to which is derived from the public lands of the United States, presents an especially appropriate context to end these machinations and unmistakably mark the demise of *Hughes.*

Hughes arose because Washington, upon its admission to the Union, adopted a constitutional provision which denied ownership of accretion to littoral property owners, a right which pre-statehood property owners claimed under the common law. *Hughes, supra,* 389 U.S. at 291. The court was asked "[w]hether federal or state law controls the ownership of land, called accretion, gradually deposited by the ocean on adjoining upland property conveyed by the United States prior to statehood." *Id.* at 290-291.

In answering that federal law determined ownership, the Court relied on *Borax, Ltd. v. Los Angeles, supra*, characterized by Justice Black as deciding ". . . that the extent of ownership under the federal grant is governed by federal law." *Hughes, supra*, 389 U.S. at 292. The *Hughes* court went on to say that *Borax* was correctly decided because:

> "[t]he rule deals with waters that lap both the lands of the State and the boundaries of the international sea. This relationship, at this particular point of the marginal sea, is too close to the vital interest of the Nation in its own boundaries to allow it to be governed by any law but the 'supreme Law of the Land'." *Id.* at 293.

Following the *Hughes* decision, the Supreme Court, again relying on *Borax*, but without citing *Hughes*, determined in *Bonelli Cattle Company v. Arizona*, 414 U.S. 313 (1973) ("Bonelli"), that, as the issue to be decided was the nature and extent of a federal "grant" of the bed of a navigable river under the Equal-Footing Doctrine and the Submerged Lands Act, Act of May 22, 1953, 67 Stat. 29, 43 U.S.C. section 1301, *et seq.*, the issue would be decided as a matter of federal law. *Bonelli, supra*, 414 U.S. at 320-321.

In 1977, however, this incipient line of reasoning[33] was repudiated by *Corvallis. Corvallis*, correctly perceiving the issue, held that *Borax* was *not* authority to apply federal law to determine the effect upon a water boundary of subsequent changes in that boundary. *Corvallis, supra*, 429 U.S. at 376-377. Once sovereign title vests, it ". . . is not sub-

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[33] *Hughes* and *Bonelli* contradicted, without explanation, a long line of Supreme Court cases which held that state law should be applied to title and boundary disputes. *E.g., Pollard's Lessee, supra*, 3 How. at 229-230; *Joy v. St. Louis*, 201 U.S. 332, 340, 343 (1906); *Arkansas v. Tennessee*, 246 U.S. 158, 175-176 (1918). *Hughes* and *Bonelli* thus radically departed from established precedent and introduced a whole new line of reasoning.

ject to later defeasance by operation of any doctrine of federal common law." *Id.* at 370-371. *Borax* requires that *only* the initial determination of the boundary between state tide and submerged lands acquired under the Equal-Footing Doctrine and federal riparian lands be decided as a matter of federal law. *Id.* at 376.

> "The expressions in *Bonelli* suggesting a more expansive role for the equal-footing doctrine are contrary to the line of cases following *Pollard's Lessee.*" *Id.* at 376-377.

The *Corvallis* Court analyzed its misconception in *Bonelli:*

> ". . . Our error, as we now see it, was to view the equal-footing doctrine enunciated in *Pollard's Lessee v. Hagan* as a basis upon which federal common law could supersede state law in the determination of land titles. *Precisely the contrary is true. . . .*" *Id.* at 371. (Emphasis added.)

Indeed, the Court recognized that the rule laid down by *Pollard's Lessee* has been considered and adopted ". . . in an unbroken line of cases which make it clear that the title thus acquired by the State [by virtue of the Equal-Footing Doctrine] is absolute so far as any federal principle of land title is concerned." *Id.* at 374; *Montana v. United States, supra,* 101 S.Ct. at 1251. Consequently, as tide and submerged lands came to California absolutely free of "any federal principle of land title," the effect of subsequent changes in the boundary between state tide and submerged lands and federally owned littoral uplands must be determined under state law.

The *Corvallis* majority relegated *Hughes* to a footnote discussion, recognizing that *Hughes* had been fatally undermined. *Corvallis, supra,* 429 U.S. at 377, fn. 6. It was specially noted that *Hughes* gave *Borax* the same expan-

sive reading as had *Bonelli* and that even in *Bonelli* the Court had expressly declined to rely on *Hughes*. *Ibid.* Apparently *Hughes* was not explicitly overruled because *Hughes* was not expressly relied on in *Bonneli* and *Hughes* dealt with "ocean-front property." *Ibid.*

The United States has grasped this slim reed to support its assertions in this case,[34] even though the logic of the majority in *Corvallis* and the explicit statement in the dissent make clear that the majority had, in fact, overruled *Hughes*. Justice Marshall, joined by Justice White, found the majority ". . . reject[ed] the reasoning on which *Hughes* is based . . ." and that it was ". . . difficult to take seriously the suggestion that the national interest in international relations justifies applying a different rule to ocean-front land grants than to other grants by the Federal Government. . . . There are no international relations implications in the ownership of land above the line of mean high tide." *Id.* at 383, n. 1 (Marshall, J., dissenting).

In this case the precise factual setting is presented to enable the Supreme Court finally to dispose of any remaining viability of *Hughes*. In *Hughes* the upland property was located on the coast, had been granted by federal patent out of the public domain and its seaward boundary had moved. In this case, the upland property, the Coast Guard Site, is located on the coast, is owned by the United States as part of the public domain and its seaward boundary has moved.

Also it is apparent that reliance on the choice-of-law rule of *Hughes*, applying federal common law to boundary and title disputes, would be contrary to a long line of Supreme Court precedents applying state law to such dis-

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[34]Exhibit H.

putes.[35] And application of the *Hughes* choice-of-law rule could cause defeasance of the State's sovereign title by operation of principles of federal common law[36] contrary to the clear holding of *Corvallis, supra,* 429 U.S. at 370-371, recently again affirmed in *Montana v. United States, supra,* 101 S.Ct. at 1251. Finally, sanction of such a rule would result in the creation of two incongruous systems for the determination of boundary disputes, one requiring application of federal law in coastal boundary cases when the United States is a disputant and the other applying state law when the United States is not concerned. The undesirability of such a result has long been recognized by this Court. *United States v. Oklahoma Gas Co.,* 318 U.S. 206, 211 (1943); *Wilson, supra,* 442 U.S. at 674.

Therefore, original jurisdiction of this case is appropriate. Not only does this case concern title to significant coastal lands, but it is virtually factually identical to *Hughes.* Only the Supreme Court can finally inter any vestigal remains of *Hughes* and confound the stubborn attempt by the United States to resurrect the *Bonelli/Hughes* "rule" to cause defeasance by application of federal common law doctrines of the absolute title received by California in its sovereign lands. But a further reason the Supreme Court should exercise original jurisdiction lies in the fact that the choice-of-law decision in controversy bears on the essential sovereignty of all the States.

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[35] *Supra,* footnote 33.

[36] *Supra,* footnote 30.

C. In a Case Where the Essential Sovereignty of the States Vis-A-Vis the United States is Concerned, the Supreme Court Is the Only Forum to Determine the Choice-of-Law

1. This Case is About the Essential Sovereignty of the States

The Tenth Amendment to the Constitution and the Equal-Footing Doctrine preserve and protect the sovereign power of each State to establish for itself a system of law for determining titles to and boundaries of lands within its borders.

The classic expression of the force of the Tenth Amendment is found in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). In that case, Justice Brandeis, after setting forth the reasons for the decision and the background of the rule of *Swift v. Tyson*, 16 Pet. 1 (1842), wrote for the Court:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State . . . . There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State . . . . And no clause in the Constitution purports to confer such a power upon the federal courts. . . . [I]n applying the doctrine [of *Swift v. Tyson*] *this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States*'." *Id.* at 78-80. (Emphasis added.)

Significantly, even when the rule of *Swift v. Tyson, supra,* was in vogue, "federal common law" did not govern real property disputes. An exception was made for the local law of real property because of the immovable and intraterritorial nature of real property. *Swift, supra,* 16 Pet. at 18-19. As most recently declared in *Corvallis,*

"[u]nder our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States." *Corvallis, supra,* 429 U.S. at 378.

The Equal-Footing Doctrine too defines the sovereign authority of the States to govern the title to real property within their borders. E.g., *Montana v. United States, supra,* 101 S.Ct. at 1251. Also it defines another fundamental attribute of that sovereignty, the States' title to lands beneath navigable waters.[37] Justice Stewart, dissenting in *Bonelli,* delineated the contours of the Equal-Footing Doctrine as it was to be reaffirmed by the majority of the Court three years later in *Corvallis, supra,* 479 U.S. at 381-382, as follows:

> "I think this ruling [the majority opinion in *Bonelli*] emasculates the equal-footing doctrine, under which this Court has long held 'that the new States since admitted have the same rights, sovereignty, and jurisdiction . . . as the original States possess within their respective borders'." . . .
>
> After the Revolution, the 13 Original States succeeded both to the Crown's title to the beds underlying navigable rivers and to its sovereignty over that property . . . '[T]he shores of navigable waters and the soils under the same in the original States were not granted by the Constitution to the United States, but were reserved to the several States.' . . . If the equal-footing doctrine means what it says, then the States that were later admitted to the Union must hold the same title and must exercise the same sovereignty. . . . *Just as with other real property within a State's boundaries, an element of sovereignty over*

[37]Such title is confirmed by statute. Submerged Lands Act, Act of May 22, 1953, Title II, § 3, 67 Stat. 30, 43 U.S.C. § 1311; *United States v. California, supra,* 381 U.S. at 145-146.

> *the property constituting the riverbed is the power of the State's courts to determine and apply state property rules in the resolution of conflicting claims to that property." Bonelli, supra,* 414 U.S. at 332-333 (Stewart, J., dissenting) (Citations omitted; emphasis added.).

Thus, in this case, both attributes of the essential sovereignty of the States, their sovereign land title and the right to apply their own law to determine title to that land, are in issue.

2. As the Essential Sovereignty of the States Is Concerned When the United States, Through Assertion of Doctrines of "Federal Common Law," Seeks to Cause Defeasance of State Sovereign Land Title, the Supreme Court Is the Only Forum to Determine Whether There Is Any Overriding Federal Interest That Could Ever Require Displacement of State Law and Application of Federal Law to Determine Title to Such State Sovereign Lands

Corvallis, which reaffirmed the inveterate rule that state law determines title to and boundaries of lands within a State, *Corvallis, supra,* 429 U.S. at 371, also found some limited circumstances in which federal law must apply to determine such questions. The Court very carefully delineated those narrow situations:

1. Cases about the extent of title granted by a former sovereign and required by treaty to be confirmed by the United States;

2. Interstate boundary original jurisdiction cases about the effect of change in the location of a boundary water course on the political boundary between two States;

3. Cases about the "navigational servitude possessed by the United States; and

4. Cases about the boundaries of a State's sovereign lands at the time of admission. *Id.* at 375-376.

Although none of these situations is present here, and California submits that state law must apply to determine this boundary question, it may be argued that *Corvallis* impliedly created a further exception for coastal boundary cases to the rule requiring application of state law to questions of land title or boundaries. *Id.* at 377, fn. 6. Argument may also be made that as the upland property is owned by the federal government as part of the public domain, there is some overriding federal interest requiring state law to be displaced by federal law. See *e.g., Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); *United States v. Standard Oil Co.*, 332 U.S. 301 (1947).

Assuming *arguendo* the validity of these arguments, the Court recently explained that application of federal law is not required merely by virtue of a federal interest in the outcome.

> "Controversies . . . governed by federal law, do not inevitably require resort to uniform federal rules. [Citations omitted.] Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy 'dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law'. [Citation omitted.]" *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727-728 (1979); *Standard Oil Co., supra*, 322 U.S. at 310; *Wilson, supra*, 442 U.S. at 671-672.

In fact, this Court recently acknowledged that, even though a boundary controversy between a State and the United States acting as trustee for an Indian tribe was to be governed by federal law, *Wilson, supra,* 442 U.S. at 671, state law would be adopted as the federal rule of decision, *Id.* at 673-676, as "[t]his is . . . an area in which the States have substantial interest in having their own law resolve [such] controversies . . . ," *Id.* at 674.

As root principles of federalism are called into question in deciding whether to apply federal law and, if so, whether to fashion a nationwide federal rule or to adopt state law as the rule of decision in coastal boundary cases between the States and the United States, this case should be accepted for original jurisdiction. Such questions test the very sovereignty of the States—state sovereign land title and the right of the States to have such title determined by application of state, not federal, law. It is not without reason that this question has been long considered to be ". . . the most important controversy ever brought before [the Supreme Court], either as it respects the amount of property involved, or the principles on which the . . . judgment proceeds . . .", *Pollard's Lessee, supra,* 3 How. at 235 (Catron, J., dissenting).

The elemental clash between these basic tenets of federalism and assertions that could cause a defeasance of State sovereign land title by operation of doctrines of federal law presents issues of such fundamental importance that the Supreme Court should accept original jurisdiction of this case.

CONCLUSION

California urges the Supreme Court to accept original jurisdiction of this choice-of-law controversy. Only this Court can inter completely any remaining viability of the *Bonelli/Hughes* "rule" and prevent the ill-conceived effort by the United States to cause defeasance of California sovereign land title by operation of federal law doctrines. Only the Supreme Court can correct the obstinate refusal of the United States to accept the mandate of *Corvallis* that it is a long recognized, fundamental State sovereign right, basic to the federal system, to have the title to or boundaries of its sovereign lands determined in accordance with its own non-discriminatory state laws even when the United States is a contestant.

Dated: July 6, 1981

GEORGE DEUKMEJIAN
Attorney General
N. GREGORY TAYLOR
Assistant Attorney General
BRUCE S. FLUSHMAN
PATRICIA SHEEHAN PETERSON
LINUS MASOUREDIS
Deputy Attorneys General

By BRUCE S. FLUSHMAN

PATRICIA SHEEHAN PETERSON
Attorneys for the Plaintiff
State of California

No. , Original

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

STATE OF CALIFORNIA, ex rel.
STATE LANDS COMMISSION,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

The State of California, ex rel. State Lands Commission, by its Attorney General George Deukmejian (herein "California"), alleges:

1. This is an action to:

a. Quiet title to certain lands located within the Northern District of California in Humboldt County, California. Such lands are referred to herein as "subject land," are particularly described in Exhibit A and are delineated on Exhibit B. Said exhibits are attached hereto and incorporated by reference herein; and

b. Determine the rights of California and the United States in and to the subject land.

2. The Supreme Court has jurisdiction over this action pursuant to Article III, Section 2, Clause 2 of the Constitution of the United States and 28 U.S.C. sections 1251(b)(2), 1346(f) and 2201.

3. Title 28, United States Code, Section 2409a and the Submerged Lands Act, 43 U.S.C. §§ 1311, et seq. provide consent to sue the United States in this action to quiet title.

STATEMENT OF FACTS

4. By the Treaty of Guadalupe Hidalgo, 9 Stat. 922, the United States was ceded, *inter alia*, all title to tide and submerged lands held by the former sovereign Mexico, (hereinafter "sovereign lands"). These sovereign lands were held in trust for the future States that were formed from the ceded territory.

5. Upon its admission to the Union on September 9, 1850, Act of September 9, 1850, 9 Stat. 452, or as confirmed by virtue of the Submerged Lands Act, 43 U.S.C. §§ 1311 et seq., California became vested with absolute title to these sovereign lands free of any federal claim of title or federal principle of land title.

6. California holds these sovereign lands in trust for the people of California.

7. The entrance channel to Humboldt Bay, Del Norte County, California passes between two low sandy peninsulas known as the North Spit and the South Spit. By secretarial orders of December 26, 1859, and August 29, 1871, public lands of the United States on the North Spit in section 6, Township ("T") 4 North ("N"), Range ("R") 1 West ("W"), Humboldt Base and Meridian ("H.B.M.") and Lots 3 and 4, section 31, T5N, R1W, H.B.M. were reserved from sale by the United States. Such lands are collectively referred to herein as the "Coast Guard Site."

8. Commencing in 1889, the United States began construction of works extending westerly into the Pacific Ocean at the entrance channel to Humboldt Bay. Said works were comprised of two parallel rubble mound jetties, one of which extended westerly into the Pacific Ocean from the southerly point of the North Spit at the Coast Guard Site.

9. The construction of the jetty interfered with the natural regime of littoral sand transport along the western boundary of Coast Guard Site. As consequence, alluvion has been and is being deposited along said western boundary of the Coast Guard Site below the ordinary high-water mark, resulting in the formation of the subject land.

10. Except for minimal installations aiding navigation, consisting of a fog horn, the subject land is vacant and unoccupied sand dunes.

11. California is the owner of the subject land.

FIRST COUNT

[QUIET TITLE, 28 U.S.C. § 2409a]

12. The allegations of paragraphs 1-11, inclusive hereof, are realleged and incorporated herein by reference.

13. The United States claims a fee simple interest in the subject land.

14. The claim of defendant United States is without any right whatever, and defendant United States has no right, title, or interest in the subject land.

COUNT TWO

[DECLARATORY RELIEF, 28 U.S.C. § 2201]

15. The allegations of paragraphs 1-11, inclusive, hereof are realleged and incorporated by reference herein.

16. There is an actual, substantive controversy between California and the United States in that:

a. There is a controversy concerning the ownership and rights in and to the subject land; and

b. There is a controversy concerning whether the United States has a duty to recognize the interest of California in and to the subject land.

PRAYER

WHEREFORE, California prays for the following relief:

1. That judgment be entered quieting the title of the State of California in and to the subject land and declaring that the defendant United States has no right, title or interest in or to said land and that said defendant United States be forever barred from asserting any claim whatsoever in the subject land or any part thereof adverse to the State of California.

2. For an order compelling the United States to recognize California's interest in the subject land and to cause to be executed a quitclaim deed, on behalf of the United States, conveying any and all claimed right, title, or interest of the United States in or to the subject land.

3. For an order setting forth the respective rights and interests of the parties in and to the subject land and the obligation of the United States to recognize the interest of California in and to the subject land.

4. For California's costs of suit herein.

5. For such further and other relief to be granted as the Court may deem just and proper.

Dated: July 6, 1981

GEORGE DEUKMEJIAN
Attorney General

N. GREGORY TAYLOR
Assistant Attorney General

BRUCE S. FLUSHMAN
PATRICIA SHEEHAN PETERSON
LINUS MASOUREDIS
Deputy Attorneys General

BRUCE S. FLUSHMAN
Deputy Attorney General
Attorneys for California

(Exhibits Follow)

EXHIBIT A

DESCRIPTION OF "SUBJECT LAND"

All that certain real property in the State of California, County of Humboldt situated in Townships 4 and 5 North, Range 1 West, Humboldt Base & Meridian ("HB&M") and particularly described as follows:

COMMENCING at the east ¼ corner of Section 31, Township 5 North, Range 1 West HB&M, thence from said point of commencement; N 88° 01′ 20″ W, 1981.14 feet along the north line of U.S. Lot 3 of said Section 31, as said lot is shown on the official United States Government Township Plat, to the United States Meander Line of the Pacific Ocean as surveyed by J.S. Murray under contract dated October 18, 1854, and the TRUE POINT OF BEGINNING: thence from said true point of beginning southerly along the shore of the Pacific Ocean with the meander lines of said Section 31 the following (3) courses:

1. S 14° 38′ 54″ W, 395.44 feet;
2. S 03° 38′ 54″ W, 1863.84 feet; and
3. S 10° 21′ 06″ E, 400.10 feet; to the United States Meander Corner on the Township line common to said Townships 4 and 5 North Range 1 West; thence southerly along the shore of the Pacific Ocean with the meander lines of Section 6 of Township 4 North, Range 1 West as surveyed by J. H. Miller under contract dated October 19, 1854, the following (3) courses:

1. S 08° 24′ 17″ W, 968.24 feet;
2. S 01° 24′ 17″ W, 869.50 feet; and
3. S 11° 35′ 43″ E, 646.26 feet more or less to the centerline of the North Jetty at the entrance to Humboldt

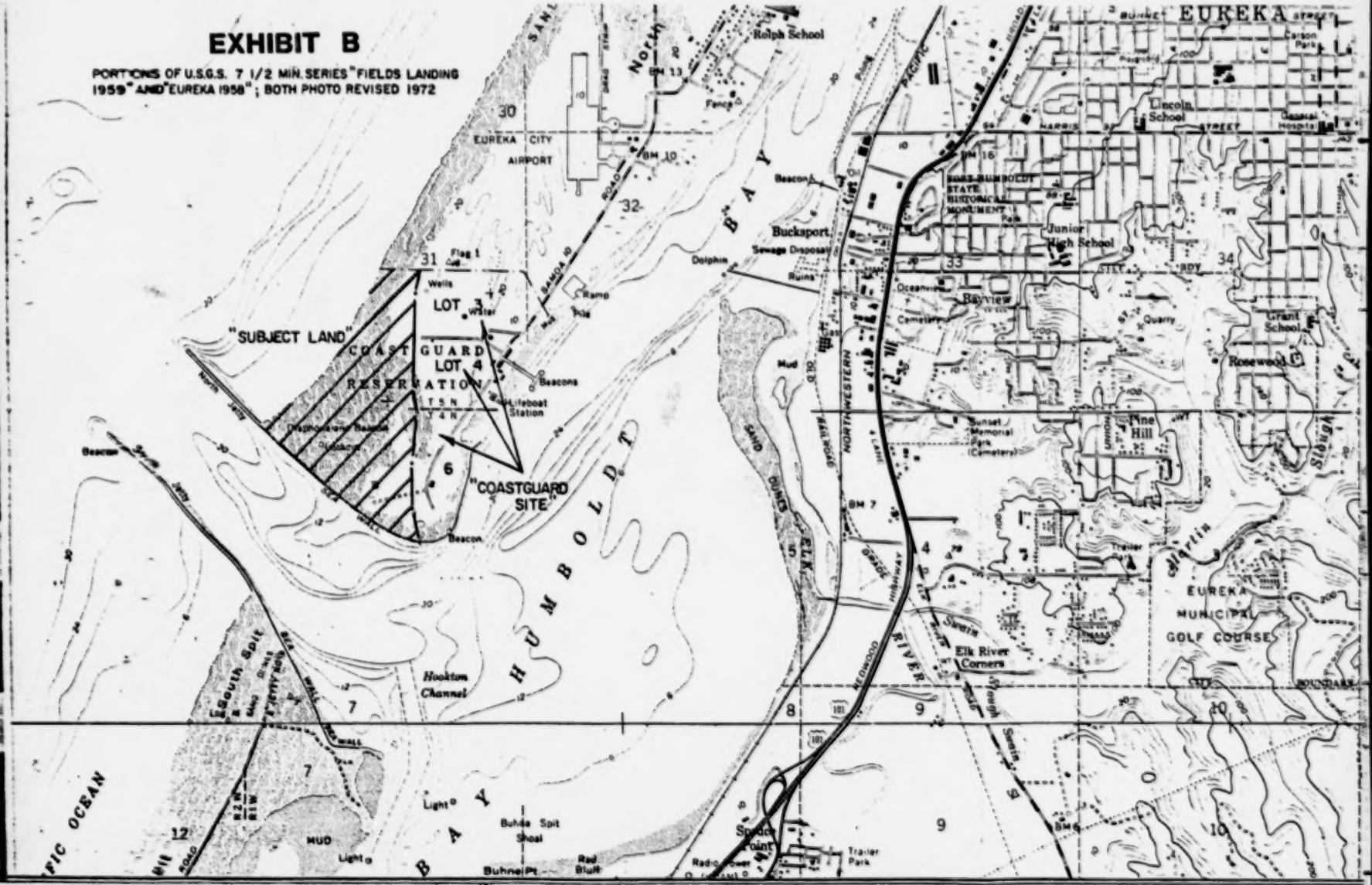
Bay; thence westerly along said centerline the following (6) courses:

1. N 75° 15′ 58″ W, 307.31 feet;
2. N 65° 00′ 58″ W, 431.97 feet;
3. N 52° 05′ 24″ W, 442.91 feet;
4. N 53° 15′ 24″ W, 408.72 feet;
5. N 50° 02′ 05″ W, 400.00 feet;
6. N 46° 08′ 24″ W, 1427 feet more or less to the line of mean high water of the Pacific Ocean; thence northerly along said line of mean high water to a point which bears N 88° 01′ 20″ W, from the true point of beginning; thence S 88° 01′ 20″ E, along the north line of U.S. Lot 3, of Section 31 of Township 5 North, Range 1 West produced, to the true point of beginning.

Bearings and distances are based on the State of California Coordinate System (Lambert Conformal Projection), Zone 1, derived locally from that certain map entitled "Record of Survey, Surplus Property," recorded in Book 29 of Surveys at Page 137, Humboldt County Records as surveyed by the United States Coast Guard; 12th District.

EXHIBIT B

PORTIONS OF U.S.G.S. 7 1/2 MIN. SERIES "FIELDS LANDING 1959" AND "EUREKA 1958"; BOTH PHOTO REVISED 1972



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No. 89, Original

In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF CALIFORNIA EX REL.
STATE LANDS COMMISSION, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON BILL OF COMPLAINT

ANSWER

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

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STATE OF CALIFORNIA EX REL.
STATE LANDS COMMISSION, PLAINTIFF

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ANSWER

The United States of America, by its Solicitor General, answers the complaint of the State of California as follows:

With respect to each of the numbered paragraphs:

1. Admits the allegations of paragraph 1.

2. Admits that this Court has jurisdiction over the action.

3. Admits that through 28 U.S.C. 2409a the United States has consented to be sued in this action. Denies the remaining allegation of paragraph 3.

4. Admits that by the Treaty of Guadalupe Hidalgo, 9 Stat. 922, the United States was ceded, *inter alia*, all title to tide and submerged lands held by the former sovereign Mexico. Admits that so much of said tide and submerged lands as lie landward of the coastline were held in trust for the future states that were formed from the ceded territory. Denies that so much of such

tide and submerged lands as lie seaward of the coastline were held in trust for the future states that were formed from the ceded territory.

5. Admits that upon its admission to the Union California became vested with absolute title to submerged and tidelands landward of the coastline. Admits that, except as such lands were retained by the United States pursuant to Section 5 of the Submerged Lands Act (43 U.S.C. 1313), the said Act vested absolute title in California to all submerged lands seaward and within three nautical miles of the coastline, so long as such lands remained submerged and within such distance from the ambulatory coastline, as that term has been defined by this Court's decisions under the Act. Denies that California has any interest in submerged lands more than three nautical miles from the coastline.

6. As to the tide and submerged lands to which California holds title, the United States has insufficient information upon which to form a belief as to whether or not they are held in trust for the people of California.

7. Admits the allegations of paragraph 7.

8. Admits the allegations of paragraph 8.

9. Admits the allegations of paragraph 9.

10. Admits the allegation of paragraph 10.

11. Denies the allegation of paragraph 11.

12. Responds to the allegations of paragraph 12 as it responded to each of those allegations when set out in paragraphs 1 through 11.

13. Admits the allegation of paragraph 13.

14. Denies the allegations of paragraph 14.

15. Responds to the allegations of paragraph 15 as it responded to each of those allegations when set out in paragraphs 1 through 11.

16. Admits the allegations of paragraph 16 except denies any inference that California has any interest in and to the subject land.

WHEREFORE, the United States prays for the following relief:

1. That judgment be entered quieting the title of the United States in and to the subject land and declaring that the plaintiff State of California has no right, title or interest in or to said land and that said plaintiff State of California be forever barred from asserting any claim whatsoever in the subject land or any part thereof adverse to the United States.

2. For the United States' costs of suit herein.

3. For such further relief as this Court may deem just and proper.

REX E. LEE
Solicitor General

NOVEMBER 1981

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CLERK

No. 89, Original

In the Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CALIFORNIA, EX REL.
STATE LANDS COMMISSION, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO FILE COMPLAINT

MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General

LOUIS F. CLAIBORNE
Deputy Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 89, Original

STATE OF CALIFORNIA, ET REL.
STATE LANDS COMMISSION, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO FILE COMPLAINT

MEMORANDUM FOR THE UNITED STATES

---

1. As we understand California's statement of the case, the underlying facts are alleged to be the following:

(a) At the time of California's admission to the Union in 1850, and for half a century thereafter, most of the lands now claimed were permanently submerged below the Pacific Ocean and some small part of them were tidelands—uncovered at low tide and submerged at high tide—adjacent to ocean-fronting uplands owned by the United States;

(b) Some years after California statehood, the United States withdrew the adjacent uplands from the public domain to create a Coast Guard Reservation, whose boundary on the Pacific Ocean was the line of mean high water;

(c) As a result of the construction by the United States of jetties at the turn of the Century, fairly rapid accretion occurred on the ocean side of the Coast Guard Reservation, so that the former submerged lands and tidelands in suit became uplands, the process being complete well before 1953;

(d) But for the construction, improvement and maintenance of the jetties, the lands in suit would have remained submerged or tidelands, approximately as they were in 1850 and for the next half century.

For present purposes, we accept that statement as accurate. We likewise agree that, as a matter of federal law, accretion so caused inures to the upland owner, while under the law of California, such accreted lands would remain sovereign State lands if they were such before the artificial accretion.

2. In the special circumstances, we join California in its suggestion that the claim is properly presented directly to this Court. Although the controversy might be remitted to a district court, it is within the non-exclusive original jurisdiction of this Court. 28 U.S.C. 1251(b)(2); *California* v. *Arizona*, 440 U.S. 59, 63-68 (1979). For good reason, the Court is reluctant to entertain original actions when another forum is available. But, in this instance, the exercise of the Court's special jurisdiction seems appropriate because only questions of law are involved and because the resolution of those questions uniquely turns on prior decisions of this Court.

California suggests that this Court alone can answer whether *Hughes* v. *Washington*, 389 U.S. 290 (1967), has been effectively overruled by *State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977). We agree. But we do not rest our submission that the case is properly here on that ground. As we read it, the later decision in *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979), settles that federal law governs a controversy in which the United States is claiming land adjacent to navigable waters as the original and present owner (*id.* at 669-671), and *Hughes* is relevant only in determining whether it is appropriate to borrow State law as the federal rule when the dispute involves the

boundary of land on the open sea. Still more fundamental, however, is the issue whether the formerly submerged lands claimed by California were ever owned by the State. The answer depends most immediately upon the Submerged Lands Act of 1953, 43 U.S.C. 1311 *et seq.*, and the controversy thus presents a question traditionally considered by this Court in the exercise of its original jurisdiction. See *United States* v. *Alaska*, 422 U.S. 184, 186 n.2 (1975). Ultimately, the present case is ruled by prior constitutional decisions of this Court. Those are, we submit, sufficient reasons to call into play the Court's original jurisdiction.

3. California repeatedly invokes *Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212 (1845), as supporting its claim to the acreage in dispute, primarily submerged lands of the continental shelf before 1953 which at no time underlay inland waters. Yet, that assertion was expressly rejected in *United States* v. *California*, 332 U.S. 19 (1947), where it was held that the State had no interest in the submerged lands of the territorial sea off its coast. See, also, *United States* v. *Louisiana*, 339 U.S. 699 (1950); *United States* v. *Texas*, 339 U.S. 707 (1950). To be sure, in 1953, Congress relinquished to the States a three-mile belt of submerged lands along their coasts. 43 U.S.C. 1311-1312. But that grant cannot aid California's present claim, for, long before the Submerged Lands Act became effective, the area now in dispute had ceased to be submerged lands or tidelands.

Presumably, California argues that the Submerged Lands Act did not make a new grant, but constituted a retrospective overruling of this Court's first *California* decision and "confirmed" to the coastal States a belt of seabed that the Constitution itself had vested in each new State upon its admission to the Union. Thus, title to the lands now in dispute, while submerged or tidelands, would have been vested, *nunc pro tunc*, in the State, subject to divestment only in accordance with such rules as California chose

to adopt—not including the process of "artificial" accretion. There are, however, insuperable obstacles in the way of that conclusion.

a. First, the Court has explicitly held that the 1953 statute "did not impair the validity of the [pre-Submerged Lands Act] *California, Louisiana,* and *Texas* cases," but was "a constitutional exercise of Congress' power to dispose of federal property." *United States* v. *Louisiana*, 363 U.S. 1, 7, 20 (1960). See, also, *id.* at 86 (Black, J., dissenting); *Alabama* v. *Texas*, 347 U.S. 272, 273-274 (1954); *id.* at 275-277 (Reed, J., concurring); *United States* v. *California*, 381 U.S. 139, 145-148 (1965); *United States* v. *Louisiana* (Texas boundaries), 389 U.S. 155, 156-157 (1967); *Texas Boundary Case*, 394 U.S. 1, 2 (1969); *United States* v. *Maine*, 420 U.S. 515, 524-526 (1975); *United States* v. *Louisiana*, 446 U.S. 253, 256, 268 (1980). Indeed, it could hardly be otherwise. The Court's first "tidelands" decisions construed the Constitution and Congress could not overrule them if it chose. Nor has the Court itself changed its view. See *United States* v. *Maine, supra.*

b. What is more, attributing any different objective to the Submerged Lands Act would raise additional constitutional problems. The statute was sustained as a disposition of *federal* property, a matter over which Congress has plenary power under Article IV. But if this Court's holding that the territorial seabed did not inure to the States were deemed reversed retrospectively, it would be most difficult to defend critical provisions of the Act, and its corrollary, the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.* Presumably, Congress cannot withhold any part of what the Constitution itself granted to the States. Yet, the Submerged Lands Act purports to limit the States' share of the seabed to three miles from present coastlines along the Atlantic and Pacific Oceans, regardless of historic boundaries (*United States* v. *California, supra*, 381 U.S. at 159-160,

163-167, 174, 176-177; *United States* v. *Maine, supra*, 420 U.S. at 519-527), and to a maximum of three leagues from modern coastlines in the Gulf of Mexico, even when, due to erosion, the historic boundary was more seaward (*Texas Boundary Case, supra*, 394 U.S. at 4-6). In every case, moreover, the statute exempts from the grant—without compensation—any area otherwise within the State's territorial seabed effectively appropriated by the United States at any time before 1953. 43 U.S.C. 1313; see *United States* v. *California*, 436 U.S. 32, 38-41 (1978).

So, also, if the Submerged Lands Act were viewed as merely implementing a grant already made by the Constitution itself, it seems doubtful that the Equal Footing principle would condone a scheme under which Gulf States alone were free to establish "historic" claims up to nine miles while the same privilege was denied to the States bordering the Atlantic or the Pacific. See *United States* v. *Texas, supra*, 339 U.S. at 717-720.

c. Finally, California's submission would produce wholly anomalous consequences. Thus, California itself has successfully argued that the Submerged Lands Act grant is measured from its present coastline, as artifically extended by landfill and the construction of jetties and other coast protective works. *United States* v. *California, supra*, 381 U.S. at 176-177; (Supplemental Decree) 382 U.S. 448, 449 (1966); (Second Supplemental Decree) 432 U.S. 40, 41-42 (1977). See, also, *Louisiana Boundary Case*, 394 U.S. 11, 40-41 n.48, 48-49 n.64 (1969); *United States* v. *California*, 447 U.S. 1, 5-8 (1980). Yet, consistently with its present assertions, the State must claim ownership of those artificial extensions, or at least the underlying previously submerged lands—as well as the "bulges" of additional territorial sea belt thereby produced. That would, indeed, be having one's cake and eating it too.

The argument strains common sense too far. It requires attributing to Congress an intent to "restore" sovereign rights in the seabed by resorting to contradictory formulae. A uniform federal rule would be applied in fixing the low water line, which follows the shifting actuality regardless of cause, and, at the same time, varying State law rules must be adopted in setting the high water line along the same coast, including a rule that departs from current reality when geographical changes result from man-made construction. The incongruity is most obvious when, as is true along much of the California coast, the lines of low and high water, at any given period, almost coincide on the geographer's chart. Indeed, under California submission, where there has been erosion of the land due to artificial causes, the high water line, in law, may be seaward of the legally governing low water line—and that for the purposes of construing the same statute.

Constitutional objections aside, it is hardly conceivable that Congress should have ordained such illogical, inequitable, and impractical results. This Court has determined that the "coastline" relevant for purposes of the Submerged Lands Act is the baseline recognized in international law, which is ambulatory, following geographical realities regardless of cause, and which, along the open coast, is marked on current nautical charts. *United States* v. *California, supra*, 381 U.S. at 163-166, 175-177; *Louisiana Boundary Case, supra*, 394 U.S. at 19-35. That is, of course, a practical standard. But the virtue of that relatively simple rule would be defeated if it were necessary also, in every case, to plot the historic line of mean high water or the fictional high water line that unaided nature might have created. In the present instance, such a reconstruction may be possible. In others, however, the task simply would not be feasible, or would burden the courts—including this Court—with endless litigation. One need only contemplate the varying contentions that would confront us if we had to

redraw the Louisiana coast discounting the effect of coast protective works, jetties, landfill, channel dredging and all other human activities that have changed the shoreline.

d. Our own submission, we stress, works no injustice to the coastal States. Whenever the United States, in the exercise of the federal navigational servitude, builds jetties or other works along the coast, it is presumptively directly *benefiting* the State affected, as well as the Nation as a whole. Sometimes, to be sure, an incidental consequence (after 1953) is to deprive the State of some submerged acreage. But that is normally compensated under the Submerged Lands Act by pushing outward the boundary of the three-mile belt, usually creating a "bulge" of new State seabed larger than the acreage lost adjacent to the shore.[1] In some cases, moreover, the consequence is to create a new pocket of inland waters, which gives the State both a fuller title near shore and a more seaward baseline from which to measure its three-mile belt of territorial sea. Plainly, there is no inequity involved.

5. In sum, insofar as we are concerned with formerly submerged land, the present case does not require resolution of the continuing viability of *Hughes* v. *Washington, supra*, or even the question suggested by *Wilson* v. *Omaha Indian Tribe, supra*, whether to adopt State law as the federal rule when the United States is the upland landowner. At the time the acreage in dispute was submerged, it was federal property and its status as such did not change by its becoming upland. The Submerged Lands Act came too late to convey title to California and there is no other basis for a State claim. Thus, it remains federal land, whether as a distinct parcel of the public domain or as

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[1]Thus, for instance, a mile-long jetty, fifty feet wide, jutting out at right angles from a straight coast "appropriates" less than six acres of submerged land but produces a "bulge" of additional State territorial seabed comprising some 2,600 acres.

accretion inuring to the Coast Guard Reservation. It is of no interest to the State whether a formal "withdrawal" of the area is necessary to subject it to Coast Guard jurisdiction. In no event does the State itself have any proprietary claim there.

Much of what has been said applies equally to so much of the disputed acreage as once had the character of tidelands—the "foreshore," uncovered at low tide but submerged at high tide. Analytically, however, there is a difference in that tidelands along the coast, unlike permanently submerged lands, are deemed to have inured to the State upon admission to the Union under the *Pollard* rule, a principle left unimpaired by this Court's more recent decisions denying State propriety claims in the marginal sea beyond the low water line.[2] Although we suspect the tidelands question in the present case is, as a practical matter, *de minimis*, we address it briefly.

The short answer to any complaint about the "appropriation" of State tidelands in the present context is that it results from the constitutional exercise by the United States of its overriding navigational servitude. It is well established that federal power over navigable waters extends to the line of ordinary high water and permits authorized agencies of the United States to alter the character of the foreshore, whether by permanently submerging it or permanently exposing it. So also, the United States may, without liability for compensation to the owner or permission of the State, dredge, fill in, or build upon the tidelands in the interest of

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[2]So far as we are aware, the decisions of this Court expressly confirming State title to tidelands have all involved what would today be viewed as *inland* waters, whether in bays (*Pollard Lessee* v. *Hagan, supra*), river mouths (*Shively* v. *Bowlby*, 152 U.S. 1 (1894)), or harbors (*Borax Ltd.* v. *Los Angeles*, 296 U.S. 10 (1935)). But the Court has assumed that the same rule applies to tidelands directly fronting the open sea. See *United States* v. *California, supra*, 332 U.S. at 30-31; *Hughes* v. *Washington, supra*, 389 U.S. at 294.

navigation. See, *e.g.*, *United States* v. *Commodore Park, Inc.*, 324 U.S. 386, 390-393 (1945), and cases cited. In these circumstances, one may doubt the practical importance of adjudicating naked legal title to the soil.

If such a determination is necessary, however, we cannot doubt the answer. At least on the ocean itself, where the national interest is at its greatest, it can make no sense to defer to a State law rule which freezes the status of former tidelands because the geographical change resulted from man-made construction, even though the land on both sides remains in the United States. To concede a narrow strip of State lands dividing a federal reservation in these circumstances is a result to be eschewed if at all possible. Since, under *Wilson* v. *Omaha Indian Tribe*, *supra*, the matter is governed by federal law and the only question is whether to borrow State law, there is no difficulty in avoiding the anomaly. In our view, this is plainly one of those situations in which there is a "need for a uniform national rule" to protect "federal trust responsibilities," and no countervailing substantial State interest on behalf of other affected landowners. 442 U.S. at 673-674. On the contrary, here there is every reason to subject the former submerged lands and the adjoining former tidelands to the same legal regime. Both must be governed by the federal rule if the tail is not to be permitted to wag the dog.

6. There remains only the question how the Court should deal with the case. As we have said, we believe the matter is properly submitted directly to this Court. Accordingly, we do not suggest denial of the motion for leave to file *simpliciter*. But it does not follow that the Court should refer the controversy to a Special Master or even itself give the case plenary consideration.

Traditionally, the Court has followed a very flexible practice in original cases. See Rules 9.2 and 9.5 of the Rules of this Court. One course has been to review the issue

presented on the merits, but summarily, and then to deny leave to file. *E.g., Alabama* v. *Texas, supra*; see *Ohio* v. *Kentucky*, 410 U.S. 641, 644 (1973), and cases cited. Occasionally, such an order is entered on the face of the jurisdictional papers, without oral argument. *E.g., Alabama* v. *United States*, 373 U.S. 545 (1963). More usually, the Court hears the parties orally, as in *Alabama* v. *Texas, supra*, a case not unlike the present one. That procedure, it seems to us, is appropriate here.

At all events, we would urge the Court not to appoint a Special Master, at least until it has itself determined that a cause of action of sufficient substance is presented. Much wasteful effort would be saved if the Court were to resolve—as no one else can—whether (as we suggest) the issue is foreclosed by prior decisions of this Court and, if so, whether the Court is disposed to reconsider its precedents. It would be unfortunate to repeat the experience of all parties in *United States* v. *Maine, supra*, in which five years were consumed in elaborate proceedings before a Special Master, after which the Court concluded that the claims were without merit in light of prior cases which it was inappropriate to disturb. 420 U.S. at 516-519, 528.

There is, of course, nothing unusual in dispensing with the services of a Special Master when wholly legal questions are presented in original cases. Indeed, that has been the prevailing pattern in these offshore controversies since the first *California* case in 1947. Most recently, at the joint suggestion of the parties, the Court itself heard and resolved

without a reference another dispute between the United States and the State of California. See 436 U.S. 32 (1978). We suggest the same practice be followed here.

Respectfully submitted.

REX E. LEE
Solicitor General

LOUIS F. CLAIBORNE
Deputy Solicitor General

AUGUST 1981

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

STATE OF CALIFORNIA ex rel.
STATE LANDS COMMISSION,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

On Bill of Complaint

MOTION OF THE STATE OF CALIFORNIA EX REL. STATE LANDS COMMISSION FOR SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM

GEORGE DEUKMEJIAN
Attorney General of the State of California
N. GREGORY TAYLOR
Assistant Attorney General
DENNIS M. EAGAN
BRUCE S. FLUSHMAN
(Counsel of Record)
PATRICIA SHEEHAN PETERSON
Deputy Attorneys General
6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-1152
Attorneys for Plaintiff

BOWNE-PERNAU WALSH • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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In the Supreme Court

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United States

OCTOBER TERM, 1981

STATE OF CALIFORNIA ex rel.
STATE LANDS COMMISSION,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

On Bill of Complaint

MOTION OF THE STATE OF CALIFORNIA EX REL. STATE LANDS COMMISSION FOR SUMMARY JUDGMENT

The State of California ex rel. State Lands Commission moves the Court to enter summary judgment in its favor on the following grounds:

1. The pleadings and matters of which judicial notice has been requested show that there is no genuine issue as to any material fact;

2. The facts alleged in the Complaint and admitted in the Answer and the facts of which judicial notice has been requested entitle plaintiff State of California ex rel. State Lands Commission as a matter of law to judgment as prayed for in the Complaint.

Dated: November 18, 1981

GEORGE DEUKMEJIAN
Attorney General of the State of California
N. GREGORY TAYLOR
Assistant Attorney General
DENNIS M. EAGAN
BRUCE S. FLUSHMAN
(Counsel of Record)
PATRICIA SHEEHAN PETERSON
Deputy Attorneys General

By BRUCE S. FLUSHMAN
Deputy Attorney General
Attorneys for Plaintiff

No. 89, Original

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

STATE OF CALIFORNIA ex rel.
STATE LANDS COMMISSION,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

On Bill of Complaint

MEMORANDUM FOR THE STATE OF CALIFORNIA EX REL. STATE LANDS COMMISSION IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

The State of California ex rel. State Lands Commission ("California") agrees with the United States that there are no material issues of fact disputed between the parties. Other than matters as to which it has previously requested judicial notice,[1] California does not intend to rely on matters outside of the pleadings. Such additional matters relate to the undisputed fact that the United States Coast Guard recognized California's ownership of the disputed lands by applying to California for use of such lands.

[1]Exhibits In Support of California's Motion For Leave to File Complaint; Matters of Which Judicial Notice is Requested.

California's statement of the undisputed facts is set forth in its initial motion for leave to file complaint.[2] California will not reiterate such facts here.

California agrees with the United States that the only question is one of law and that in such circumstances this matter is now ripe for determination. California joins with the United States in urging the Court to dispense with reference to a special master. California also agrees with the plea of the United States that the Court enter an order setting down these cross-motions in due course and inviting the parties to file briefs regarding the respective motions.

Dated: November 18, 1981

GEORGE DEUKMEJIAN
Attorney General of the State of California
N. GREGORY TAYLOR
Assistant Attorney General
DENNIS M. EAGAN
BRUCE S. FLUSHMAN
(Counsel of Record)
PATRICIA SHEEHAN PETERSON
Deputy Attorneys General

By BRUCE S. FLUSHMAN
Deputy Attorney General
Attorneys for Plaintiff

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[2]See Statement in Support of Motion for Leave to File Complaint filed July 7, 1981, at pages 6 through 13.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF CALIFORNIA EX REL.
STATE LANDS COMMISSION, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON BILL OF COMPLAINT

MOTION OF THE UNITED STATES FOR JUDGMENT ON THE PLEADINGS AND SUPPORTING MEMORANDUM

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 89, Original

STATE OF CALIFORNIA EX REL.
STATE LANDS COMMISSION, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON BILL OF COMPLAINT

MOTION OF THE UNITED STATES FOR JUDGMENT ON THE PLEADINGS

The United States of America, by its Solicitor General, moves the Court to enter judgment in its favor on the pleadings, on the following grounds:

1. There is no disputed issue as to any material fact;

2. The facts alleged in the Complaint and admitted in the Answer entitle the United States, as a matter of law, to judgment as prayed for in the Answer.

REX E. LEE
Solicitor General

NOVEMBER 1981

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 89, Original

STATE OF CALIFORNIA EX REL.
STATE LANDS COMMISSION, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON BILL OF COMPLAINT

MEMORANDUM FOR THE UNITED STATES IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS

As the Complaint and the Answer disclose, there are no material issues of fact disputed between the parties. Neither party proposes to adduce evidence (except matters as to which judicial notice is appropriate). The only relevant facts, now effectively stipulated, are those previously identified:[1]

(a) At the time of California's admission to the Union in 1850, and for a half century thereafter, most of the lands now claimed were permanently submerged below the Pacific Ocean and some small part of them were tidelands—uncovered at low tide and submerged at high tide—adjacent to ocean-fronting uplands owned by the United States;

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[1]See Memorandum for the United States, filed August 14, 1981, at 1-2.

(b) Some years after California statehood, the United States withdrew the adjacent uplands from the public domain to create a Coast Guard Reservation, whose boundary on the Pacific Ocean was the line of mean high water;

(c) As a result of the construction by the United States of jetties at the turn of the Century, fairly rapid accretion occurred on the ocean side of the Coast Guard Reservation, so that the former submerged lands and tidelands in suit became uplands, the process being complete well before 1953;

(d) But for the construction, improvement and maintenance of the jetties, the lands in suit would have remained submerged or tidelands, approximately as they were in 1850 and for the next half century.

The only remaining question is one of law: Does this history of physical changes compel a declaration that the lands affected belong to the State of California (as claimed by the plaintiff) or that they appertain to the United States (as we maintain)? Although differing as to which are the controlling precedents, both parties agree that the answer is governed by prior decisions of this Court.[2] In these circumstances, the case is ripe for determination on the face of the pleadings and the United States and the State have joined in urging the Court to dispense with a reference to a Special Master. Instead, the United States has filed the present Motion for Judgment on the Pleadings, and we anticipate that California will do likewise. Our joint plea is that the Court enter an order setting down those cross-motions for

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[2]The State has outlined its legal argument in a Statement in Support of Motion for Leave to File Complaint, appended to the Motion filed July 7, 1981, at 2-26, and the United States has outlined its counter-argument in a responsive Memorandum filed August 14, 1981.

argument in due course and inviting the parties to file briefs in support of their respective motions.[3]

Respectfully submitted.

REX E. LEE
Solicitor General

NOVEMBER 1981

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[3]In the present situation, it seems appropriate to require the parties to file simultaneous opening briefs, with a right to each party to submit a reply brief thirty days thereafter. Cf. *United States* v. *Louisiana*, 391 U.S. 910 (1968).

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OCTOBER TERM, 1981

STATE OF CALIFORNIA, ex rel.
STATE LANDS COMMISSION,
Plaintiff,

VS.

UNITED STATES OF AMERICA,
Defendant.

On Bill of Complaint

Plaintiff, State of California, ex rel. State Lands Commission's Opening Brief In Support of Its Motion For Summary Judgment and In Opposition to the United States' Motion for Judgment on the Pleadings

GEORGE DEUKMEJIAN
Attorney General of the State of California
N. GREGORY TAYLOR
Assistant Attorney General
DENNIS M. EAGAN
BRUCE S. FLUSHMAN
(Counsel of Record)
Deputy Attorneys General
6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-1152
Attorneys for Plaintiff

BOWNE-PERNAU WALSH • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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No. 89, Original

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

STATE OF CALIFORNIA, ex rel.
STATE LANDS COMMISSION,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

On Bill of Complaint

Plaintiff, State of California, ex rel. State Lands Commission's Opening Brief In Support of Its Motion For Summary Judgment and In Opposition to the United States' Motion for Judgment on the Pleadings

JURISDICTIONAL STATEMENT AND PROCEDURAL STATUS OF CASE

By Motion for Leave to File Complaint in Original Action, filed July 7, 1981, Plaintiff, State of California, ex rel. State Lands Commission ("California") brought this original action against the United States under authority of Article III, Section 2 of the Constitution and 28 U.S.C. section 1251(b). On October 5, 1981, an order issued granting California's motion for leave to file complaint and requiring the United States to answer within 60 days. In November, 1981, the United States answered and, as well,

filed a motion for judgment on the pleadings. Thereafter, in November, 1981, California filed its motion for summary judgment and memorandum in opposition to the United States' motion for judgment on the pleadings. In their memoranda both parties requested leave to file briefs in support of their respective positions. By orders of November 30, 1981, and December 5, 1981, the Court set the cross motions for oral argument in due course and invited the parties to file simultaneous opening briefs in support of their respective positions 45 days after November 30, 1981. This opening brief is responsive to such orders.

STATEMENT OF THE CASE

On September 9, 1850, the date of California's admission into the Union, the land that is the subject of this dispute ("subject land") was land under the navigable, tidal waters of the Pacific Ocean lying along the ordinary high-water mark immediately north and west of the entrance to Humboldt Bay, California.[1] California, as an incident of its sovereignty, was the owner of these sovereign lands. E.g., *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 229 (1844); *Weber v. Harbor Commissioners*, 85 U.S. (18 Wall.) 57, 65-66 (1873); *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892); *Shively v. Bowlby*, 152 U.S. 1, 26-27 (1894); *Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 15 (1935); *State Land Board v. Corvallis Sand and Gravel Co.* ("Corvallis") 429 U.S. 363, 370-374 (1977). California

[1]Exhibit B to California's complaint depicts, for illustrative purposes, the geographic location of the subject land and its relation to adjacent United States public lands. For the Court's convenience, a copy of that Exhibit is attached hereto.

acquired such lands on an "equal-footing" with the Original States. *Ibid.* The United States has no claim of title to such lands. E.g., *Shively, supra*, 152 U.S. at 57; *United States v. California*, 332 U.S. 19, 38-39 (1947) ("the 1947 California Decision"); *United States v. California* (Decree), 332 U.S. 804, 805 (1947); *United States v. Texas*, 339 U.S. 707, 719, 723 (Reed, J., dissenting), 724 (separate views of Frankfurter, J.) (1950); *United States v. California* (Supplemental Decree), 382 U.S. 448, 452-453 (1966). And Congress confirmed California's title to such sovereign lands in the Submerged Lands Act, Act of May 22, 1953, Title II, § 3, 67 Stat. 30, 43 U.S.C. § 1311; *United States v. California*, 436 U.S. 32, 37 (1978). Thus, at the time of California's admission to the Union, California's title to these sovereign lands vis-a-vis the United States was ". . . absolute so far as any federal principle of land titles [was] concerned . . .", *Corvallis, supra*, 429 U.S. at 374 and ". . . complete . . . [,] no power of disposition remain[ing] with the United States . . .", *Borax, Ltd., supra*, 296 U.S. at 19.

Township plats prepared by the United States showing the extent and location of the public lands in the townships in which the subject land is located[2] establish that, in 1854, the subject land lay seaward of the ordinary high-water mark, being the seaward boundary of the public lands of the United States and the landward boundary of the sover-

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[2]Certified copies of these plats were lodged, on July 7, 1981, with the Court as Exhibit A to the "Exhibits in Support of California's Motion for Leave to File Complaint; Matters of Which Judicial Notice is Requested" (hereinafter "Supporting Exhibits"). California renews its request that, pursuant to Federal Rule of Evidence 201(d), the Supreme Court take judicial notice of Exhibit A as containing facts not subject to reasonable dispute.

eign lands of California. *Packer v. Bird,* 137 U.S. 661, 666, 671-672 (1891); *Borax, Ltd., supra,* 296 U.S. at 22, 26. The United States has admitted as much.[3]

In 1859 and 1871 the United States withdrew from disposition the public lands immediately adjacent to the subject lands.[4] These withdrawn public lands are referred to collectively herein as the Coast Guard site.

The ordinary high-water mark boundary between the Coast Guard site and the sovereign lands of California was, under natural conditions, an ambulatory boundary which followed the waterline through all of its gradual, natural changes. *Miramar Co. v. City of Santa Barbara,* 23 Cal.2d 170, 175, 143 P.2d 1, 3 (1943). However, after construction of jetties at the entrance to Humboldt Bay, beginning in 1891, the configuration of the Pacific Ocean shoreline of the Coast Guard site was completely altered. The dramatic and swift nature of this change is best seen by a review of the "Humboldt Bay, California, Comparison of Periodic Surveys of Bar and Entrance."[5] Even a casual review of these

[3]Memorandum for the United States (August, 1981), p. 1; Memorandum for the United States in Support of Its Motion for Judgment on the Pleadings (November, 1981), p. 1.

[4]Certified copies of the Secretarial Orders withdrawing such lands were lodged as Exhibit C to the Supporting Exhibits. California renews its request that, pursuant to Federal Rule of Evidence 201(d), the Supreme Court take judicial notice of Exhibit C as containing facts not subject to reasonable dispute.

[5]Supporting Exhibits, Exhibit D, figure 5. A certified copy of *U.S. Army Corps of Engineers, San Francisco District, Survey Report on Humboldt Bay, California,* Appendix I, "Shoreline Changes" (February 19, 1950) containing said figure 5 was lodged with the Court as Exhibit D to the Supporting Exhibits. California renews its request that, pursuant to Federal Rule of Evidence 201(d), the Supreme Court take judicial notice of Exhibit D as containing facts not subject to reasonable dispute.

surveys establishes that after jetty construction there was a pronounced seaward shift of the shoreline adjacent to the Coast Guard site. The jetties had interrupted the natural littoral sand transport system, impounding the sand and causing the build up of manmade land along the Pacific Ocean boundary of the Coast Guard site.[6] No controversy exists between the United States and California concerning this fact.[7] As shown on Exhibit B to the Complaint, approximately 184 acres of the former bed of the Pacific Ocean have been covered up and filled in through the deposition of sand caused by the United States unilateral jetty construction. The subject land lies landward of the low-water mark as it presently exists on the coast, but below the high-water mark as it existed immediately prior to the construction of the jetties. To protect California's interest in its sovereign lands, lands that are held in trust for the public, California law provides that the State, not the littoral owner, gains title to such artificially-created land. *Carpenter v. City of Santa Monica,* 63 Cal.App.2d 772, 794, 147 P.2d 964, 975 (1944).

Indeed the United States, as late as December, 1977, recognized California's ownership of the subject land. In December, 1977, the United States Coast Guard applied for

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[6]Supporting Exhibits, Exhibit D, paras. 8-16, p. 3-6; para. 21, p. 8; para. 25, p. 9-10.

[7]Complaint, para. 9; Memorandum for the United States (August, 1981), p. 1-2; Answer (November, 1981), para. 9, p. 2; Memorandum for the United States in Support of Its Motion for Judgment on the Pleadings (November, 1981), pp. 1-2.

California's permission to use the subject land to construct a watchtower.[8] California, honoring the United States' request for an expedited permit,[9] transmitted a permit to the United States for execution.[10] Only thereafter was California first advised that the United States would dispute the location of the boundary between the public lands of the United States and the sovereign lands of California.[11] Although California continued to attempt to resolve this dispute amicably,[12] she was rebuffed by the United States.[13] California was advised by the United States Bureau of Land Management that the United States would dispute California's ownership of the subject land based on the "rule" of *Hughes v. Washington,* 389 U.S. 290 (1967) that

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[8]A certified copy of a communication containing said matters was lodged with the Court as Exhibit E to the Supporting Exhibits. California renews its request that, pursuant to Federal Rule of Evidence 201(d), the Supreme Court take judicial notice of Exhibit E as containing facts not subject to reasonable dispute.

[9]*Ibid.*

[10]A certified copy of a communication containing such matters was lodged with the Court as Exhibit F to the Supporting Exhibits. California renews its request that, pursuant to Federal Rule of Evidence 201(d), the Supreme Court take judicial notice of Exhibit F as containing facts not subject to reasonable dispute.

[11]A certified copy of a communication containing such matters was lodged with the Court as Exhibit G to the Supporting Exhibits. California renews its request that, pursuant to Federal Rule of Evidence 201(d), the Supreme Court take judicial notice of Exhibit G as containing facts not subject to reasonable dispute.

[12]*Ibid.*

[13]A certified copy of a communication containing such matters was lodged with the Court as Exhibit H to the Supporting Exhibits. California renews its request that, pursuant to Federal Rule of Evidence 201(d), the Supreme Court take judicial notice of Exhibit H as containing facts not subject to reasonable dispute.

federal law determines title and boundary questions when the United States is a contending party.[14] Thus, the United States determined to ignore the Supreme Court's mandate in *Corvallis* that state, *not* federal, law determined such questions. *Corvallis, supra,* 429 U.S. at 371.

SUMMARY OF ARGUMENT

California brought this original action to defeat the United States' attempt to defease California of two fundamental attributes of its sovereignty: California's sovereign land title and California's right to apply her own laws to determine disputes over the boundaries of her sovereign land. The subject land was vested and confirmed in California as sovereign land by virtue of the Equal-Footing Doctrine and the Submerged Lands Act. Although this sovereign land was formerly beneath ocean waters, jetty construction by the United States caused deposition and some 184 acres of sovereign land were covered and filled.

As the Constitution and rulings of this Court have long recognized, the title to and boundaries of such land is determined according to state law. To use federal law to decide disputes over such lands would conflict with these principles holding that the title of the State to sovereign lands is absolute and cannot be defeased by any doctrine of federal law.

Any remains of *Hughes v. Washington, supra,* 389 U.S. 290, which held to the contrary, should be explicitly overturned. *Hughes* has been completely discredited by *Corvallis, supra,* 429 U.S. 363. *Corvallis* reaffirmed adherence to

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[14]Ibid.

the choice-of-law rule that, since 1845, has applied state law to decide property boundary questions.

Neither does *Wilson v. Omaha Indian Tribe,* 442 U.S. 653 (1979), require any different result. There is no principle of federal law requiring application of federal law to decide a dispute over the boundary between state sovereign lands and littoral fast lands owned by the United States. Indeed the intention of Congress, as set forth in the Submerged Lands Act, is that state, not federal law, should govern these disputes.

But even assuming that federal law controls the decision in this case, state law should provide the rule of decision. There is no need to create a nationwide, uniform federal rule, especially because the title to and boundaries of state sovereign land and the right to decide disputes over such land according to state law are fundamentally related to the constitutional sovereignty of the States. The results would be chaotic if two discrete systems of property law were to govern property boundary disputes with the result depending on the vagaries of who were the parties.

There is no doubt that if state law were applied to the undisputed facts here California would be held the owner of the subject land. The United States agrees. Nor can there be any doubt that the Submerged Lands Act confirmed California's title to lands formed by artificial deposition as "made" lands. And under a settled rule of property, when deposition occurs through the action of littoral owner, the owner of land on which the deposition is deposited, not the littoral owner, retains the land covered up and filled in.

Finally, no decision of this Court has ever questioned California's sovereign title landward of the ordinary low-water mark and seaward of the ordinary high-water mark, even along the open coast. Because the subject land was made as deposition occurred above the ordinary low-water mark and below the ordinary high-water mark on California's sovereign land, California's title is unquestionable.

California's motion for summary judgment should be granted and the United States' motion for judgment on the pleadings should be denied. This will assure that the relationship between the two sovereigns can remain as the Constitution envisioned, with each supreme in their separate spheres of responsibility.

ARGUMENT

I

AS AN ESSENTIAL SOVEREIGN ATTRIBUTE CALIFORNIA HAS THE CONSTITUTIONALLY FOUNDED, COURT-MANDATED RIGHT TO APPLY ITS OWN LAW TO DECIDE BOUNDARY DISPUTES REGARDING ITS SOVEREIGN LAND

Decision in this case will affect two of the basic hallmarks of California's sovereignty—title to its sovereign land and the right to apply state law to determine disputes regarding the title to and boundaries of such land. The Court must consider whether to overturn the recognized, constitutionally founded choice-of-law rule regarding application of state law in property boundary disputes, particularly those concerning state sovereign lands. Plainly, chaos in land title matters would result should the

Court ignore this long adhered to precedent by creating a separate, competing system of federal rules applicable only when the United States is a property owner. Rightly, cases such as this have long been considered to be of "signal importance." *Corvallis, supra,* 429 U.S. at 373; *Pollard's Lessee, supra,* 44 U.S. (3 How.) at 235 (Catron, J., dissenting).

A. As An Incident Of Its Sovereignty, California Received Sovereign Title To All Lands Under Navigable Or Tidal Waters Lying Below The Ordinary High-Water Mark

By virtue of the Equal-Footing Doctrine, States admitted after the Original States hold the same rights and sovereignty as the Original States possessed. E.g., *Pollard's Lessee, supra,* 44 U.S. (3 How.) at 229; *Shively, supra,* 152 U.S. at 26, 30. As the Original States had succeeded to the title of England to lands underlying navigable or tidal waters below the ordinary high-water mark, such as the subject land, the Equal-Footing Doctrine insured that the later admitted States would hold the same title in and exercise the same sovereignty over such lands as did the Original States. Ibid.; *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313, 332-33 (1973) (Stewart, J., dissenting). And Congress confirmed this already conferred title in the Submerged Lands Act, 43 U.S.C. § 1311, as did this Court, *United States v. California* (Supplemental Decree), *supra,* 382 U.S. at 452. Thus California has title to the subject land. *Supra,* p. 2-4.

B. California's Right To Apply Its Own Laws To Determine Boundary Disputes Regarding Its Sovereign Land Is A Sovereign Attribute That Is Founded In The Constitution And Has Been Confirmed By Congress And By This Court

As stated by the Court just last year in *Montana v. United States,* 101 S.Ct. 1225, 1251 (1981): "After a State enters the Union, title to [its sovereign] land is governed by state law." *Montana* is only the last in a long line of cases which hold that only the initial boundary between State and federal land is determined by federal law but that once that determination is made, conflicts over the title to and boundaries of all lands within the State, especially state sovereign lands, are determined by state law. E.g., *Shively, supra,* 152 U.S. at 57-58; *Wilcox v. Jackson,* 38 U.S. (13 Pet.) 498, 517 (1839); *Joy v. St. Louis,* 201 U.S. 332, 343 (1906); *Borax, Ltd., supra,* 296 U.S. at 22; *Wallis v. Pan American Pet. Corp.,* 384 U.S. 63, 68-71 (1966); *Corvallis, supra,* 429 U.S. at 372-378.

This rule is constitutionally based in both the Equal-Footing Doctrine and the Tenth Amendment to the Constitution. The Equal-Footing Doctrine provided that as part of the sovereignty acquired by the States admitted subsequent to the Original States, such States received not only sovereign land title, but the sovereign power to determine conflicting claims to that property in accordance with rules of state law. *Bonelli, supra,* 414 U.S. at 332-333 (Stewart, J., dissenting); *Corvallis, supra,* 429 U.S. at 378. The Tenth Amendment also preserved the sovereign power of the States to decide questions regarding the title to and boundaries of real property within

their borders. The classic expression of this facet of the Tenth Amendment is found in *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938). Justice Brandeis wrote for the Court:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State . . . . There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State . . . . And no clause in the Constitution purports to confer such a power upon the federal courts . . . . [I]n applying the doctrine [of *Swift v. Tyson,* 41 U.S. (16 Pet.) 1 (1842)] *this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States'.*" Id. at 78-80. (Emphasis added.)

Indeed, the only congressional expression in this area holds that state law is to be used to ". . . manage, administer, lease, develop, and use the [lands beneath navigable waters confirmed in the States by the Submerged Lands Act]. . . ." 43 U.S.C. § 1311(a).

And this Court has decreed that California's title to such lands includes ". . . the right and power to manage, administer, lease, develop and use the such lands . . . *all in accordance with applicable state law.*" *United States v. California* (Supplemental Decree), *supra,* 382 U.S. at 452-453 (Emphasis added).

Thus, the principle that state law controls sovereign land title and boundary conflicts is a rule that is constitutionally founded, congressionally confirmed and Court decreed.

C. Corvallis Definitively Ruled That State Law Controls Property Boundary Questions, Ending The Short-Lived Regime Of Hughes And Bonelli

Corvallis reaffirmed, after a studied analysis of the case law, that state law controls real property title and boundary questions. *Corvallis, supra,* 429 U.S. at 378. *Corvallis* emphasized that the case of *Pollard's Lessee v. Hagan, supra,* held the States received absolute title to lands underlying navigable waters and that such title was not derived from any grant[15] by Congress, but from the Constitution itself. Id. at 372-374. *Corvallis* recognized the *Pollard* rule ". . . has been followed in an unbroken line of cases which make it clear that the title thus acquired by the State is absolute so far as any federal principle of land titles is concerned." *Id.* at 374. The Court concluded that if the land at issue passed under the Equal-Footing Doctrine, as did the subject land here, the State's sovereign title ". . . is not subject to defeasance and State law governs subsequent dispositions." *Id.* at 378.

Corvallis rectified the aberrant cases of *Hughes v. Washington, supra,* 389 U.S. 290, and *Bonelli Cattle Company v. Arizona, supra,* 414 U.S. 313, by reaffirming adherence to the system that had applied state law to resolve property boundary disputes since 1845. *Corvallis, supra,* 429 U.S. at 382.

Both *Bonelli* and *Hughes,* which applied federal law to decide littoral or riparian boundary questions, were found to be based on a too expansive reading of *Borax, Ltd. v.*

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[15]The Submerged Lands Act only confirmed the States' title to such lands. *Corvallis, supra,* 429 U.S. at 371, n. 4.

Los Angeles, supra. Corvallis, supra, 429 U.S. at 377, 382. *Hughes* characterized *Borax* as holding that federal law applied to *all* disputes over land with the United States. *Hughes, supra,* 389 U.S. at 292-293. *Hughes* felt *Borax* was correctly decided as the ". . . rule deals with waters that lap both the lands of the state, and the boundaries of the international sea . . . ." *Hughes, supra,* 389 U.S. at 293.

Bonelli, which neither relied on nor cited *Hughes,* reasoned that as the issue there to be decided was the nature and extent of a federal "grant" of the bed of a navigable river under the Equal-Footing Doctrine and the Submerged Lands Act, *Borax* required the issue to be decided under federal law. *Bonelli, supra,* 414 U.S. at 319-321.

Corvallis brought a swift, but well-deserved, end to this incipient line of authority. According to *Corvallis, Borax* required that *only* the determination of initial boundary between state sovereign land acquired under the Equal-Footing Doctrine and federal littoral public lands be decided as a matter of federal law. *Id.* at 376. Once that determination was made the role of the Equal-Footing Doctrine and federal law was ended and the lands were subject to state law. *Ibid. Corvallis* overruled *Bonelli* because *Bonelli's* expanded reading of *Borax,* in effect, mistakenly overruled, *sub silentio,* the line of cases following *Pollard. Id.* at 382. *Corvallis* reaffirmed *Pollard. Id.* at 374. *Corvallis* recognized that the *Pollard* rule "has been followed in an unbroken line of cases which make it clear that the title thus acquired by the State is absolute so far as any federal principle of land titles is concerned." *Ibid.*

Corvallis gave *Hughes* only casual consideration, recognizing that *Hughes*, as *Bonelli*, had given *Borax* the same mistaken reading that was contrary to *Pollard*. *Id.* at 377, n. 16. The dissent makes explicit, however, that *Hughes* has been effectively overruled. *Id.* at 383, n. 1 (Marshall, J., dissenting). The majority failed to explicitly overrule *Hughes*, because *Hughes* dealt with "ocean-front property" and there were supposed international relations implications. *Id.* at 377, n. 6. *Hughes* should now be explicitly overruled. As the dissent noted, there are no such international relations implications. *Id.* at 383, n. 1 (Marshall, J., dissenting).

The determination of how a change in the location of the high-water line affects the real property boundary between littoral public lands and the sovereign lands of the state, the ordinary high-water mark, and whether that decision is made under state or federal law has no bearing whatsoever on federal control of and responsibility over international relations or national defense.

The 1947 California decision disposes of the United States' argument. It held that the United States has "paramount rights in, and full dominion and power over" the lands of the Pacific Ocean seaward of the ordinary low-water mark, not because it "owned" the lands[16] but because of the necessity for federal power and control over such

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[16]It is evident from the repeated, careful distinctions in the opinion between "ownership" of the submerged lands and their resources versus paramount federal "rights", "control", "dominion", and "power" over them, from Justice Frankfurter's dissent, *United States v. California, supra,* 332 U.S. at 43 (Frankfurter, J., dissenting), from the Court's striking of the word "proprietary" from the decree proposed by the United States, see *United States v. Texas,*

lands and their resources given the federal responsibility for the foreign affairs and national defense of the nation. *United States v. California, supra,* 332 U.S. at 29, 35. But the limit of these responsibilities of the federal government sufficient to require "paramount rights in and full dominion and power over" the submerged lands and their resources was never claimed by the United States and *was not held by the Court to extend landward of the low-water along the open coast. Id.* at 22, 34-35. Indeed, the landward geographical limit of any such remaining paramount rights of the United States based on external sovereignty considerations has been determined, in the case of California, to be the actual ordinary low-water mark regardless of influences—artificial or natural—that may have affected its physical location. *United States v. California,* 381 U.S. 139, 175-176 (1965); *United States v. California* (Supplemental Decree), *supra,* 382 U.S. at 449. Thus, there are no international relations implications from a decision in this case since the subject land is landward of this low-water mark. Supra, p. 5.

Further, since the effective date of the Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, U.S. T. 1606, T.I.A.S. No. 5369, in 1964, there can be no further argument as to any possible effect of domestic land title disputes on the international boundary. The United States, as a signatory to that treaty, has now

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supra, 339 U.S. at 719, 723 (Rud, J., dissenting) 724 (separate views of Frankfurter, J.), and from subsequent characterizations of the holding, *id.*, at p. 704; *United States v. California,* 436 U.S. 32, 42 (White, J., dissenting), that the 1947 California decision was not based on any determination that the United States had acquired title to, or "owned" the submerged lands or their resources.

agreed to the applicable principles of law for international boundary purposes. *United States v. California, supra,* 381 U.S. at 163-165.[17] Consequently, such feared effects of domestic litigation upon international relations do not exist.

Additionally, the Court has recognized that even though the ordinary low-water mark, as it moves by either natural or artificial means, also changes the three-mile boundary of the territorial sea, use of this ambulatory line does not defease California of its title to artificially created lands, such as the subject land, landward of that artificially made line. *United States v. California, supra,* 381 U.S. at 176-177. This also demonstrates the lack of any international relations consequences to determining the title to such lands.

Parenthetically, it should also be noted that, in this case, the seaward limit of the territorial sea is measured from the mean lower low-water line at the seaward of the jetty at the southern boundary of the subject land. *United States v. California* (Second Supplemental Decree), 432 U.S. 40 (1977). Consequently, the determination of the boundaries of the subject land, which lies entirely landward of the seaward end of the jetty, will have no effect on the international boundary.

From the foregoing, it is apparent that there are no international relations implications in coastal property boundary disputes such as in the present case.

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[17]Although the Court adopted the definitions provided in the Convention for the administration of the Submerged Lands Act this was for the internal domestic purposes of the Act. *Id.* at 165.

Corvallis settles, once and for all, that state property law controls decisions over such property boundary disputes. *Hughes,* to the extent it has any remaining viability, should be explicitly overruled.

II

NEITHER WILSON v. OMAHA INDIAN TRIBE NOR HUGHES, PROVIDE AUTHORITY FOR APPLICATION OR CREATION OF A "FEDERAL COMMON LAW" RULE TO DECIDE DISPUTES REGARDING THE TITLE TO OR BOUNDARIES OF CALIFORNIA'S SOVEREIGN LANDS

A. As California Had Sovereign Title To The Subject Land, There Is No "Pre-Existing," Un-terminated Federal Title Interest Supporting Application Of "Federal Common Law"

California has demonstrated that its title to the subject land is derived from the Equal-Footing Doctrine and that under the Constitution, the Submerged Lands Act and case law California law controls boundary and title disputes over such land. *Supra,* pp. 10-17.

Despite this settled rule the *United States* asserts that *Wilson* "settles" that federal law governs controversies in which the United States is claiming land adjacent to navigable waters as the original and present owner. Memorandum for the United States (August, 1981), p. 2.

The United States never had any pre-existing title to this sovereign land. The deposition occurred on sovereign land owned by California. *Supra,* pp. 2-5, 10; *infra,* pp. 24-30.[18]

[18]Even if the theory of the United States is adopted—that the jetty construction fixed as of 1891, the boundary between federally "owned" submerged lands and State tidelands—the Submerged

Thus the first requisite for the application of *Wilson* is not present.

B. There Is No "Principle Of Federal Law" Required To Be Protected By Application Of Federal Law To Control This Boundary Dispute

Even if one assumes that the United States had either a pre-existing interest in the subject land or that ownership of littoral property provides a sufficient interest, *Corvallis* also holds that state law governs issues relating to property, ". . . unless some other principle of federal law requires a different result." *Corvallis, supra,* 429 U.S. at 378.

Lands Act confirmed and established the State's title to such submerged lands because the confirmance related back to the time of California's statehood. *Superior Oil Company v. Fontenot,* 213 F.2d 565, 569 (5th Cir. 1954), cert. den., 348 U.S. 837 (1954); *People v. Hecker,* 179 Cal.App.2d 823, 836, 4 Cal.Rptr. 334, 343, (1960); see *Gibson v. Chouteau,* 80 U.S. (13 Wall) 92, 100-101 (1871); *United States v. Detroit Lumber Company,* 200 U.S. 321, 324 (1906) ("It is true that this doctrine is but a fiction of law, but it is a fiction resorted to whenever justice requires.") This comports with the intention of Congress to establish the States' ownership of the submerged lands and ". . . to confer [on the States] the long-standing equities which the [Submerged Lands Act] was intended to recognize." *United States v. Louisiana,* 363 U.S. 1, 38-39 (1960); *United States v. California, supra,* 381 U.S. at 199 (Black, J., dissenting). Thus any title of the United States has been yielded or terminated.

In fact, the United States' theory is contrary to the holding of *United States v. California, supra,* 381 U.S. 139. Jetty construction did not fix the location of California's low-water sovereign land boundary. Under *United States v. California* that boundary follows the mean lower low-water line, wherever it moves and regardless of cause. Id. at 176-177; *United States v. California* (Supplemental Decree), *supra,* 382 U.S. at 449; *infra,* pp. 28-30.

Wilson is merely an example of a case where there was "some other principle of federal law requiring a different result." In *Wilson*, the Court found that the United States "had never yielded title or terminated its interest" in the Indian reservation, that the Indians' right to the property depended on federal law, and that Indian title could only be extinguished with federal consent, a matter exclusively the province of federal law. *Wilson, supra,* 442 U.S. at 670-671. In such cases, federal law was held controlling (even though it did not supply the rule of decision). *Ibid.* Thus, *Wilson* does not require that federal law apply in all cases involving a claim to land title by the United States but *only* in those cases in which the United States "has not yielded title or terminated its interest" (which it has here, *supra*, pp. 18-19) and there is, in addition, a principle of federal law that is required to be protected.

If, as the United States suggests, the Court was required to choose federal law every time the United States made a claim to property or was a riparian or littoral owner, as it is here, *Corvallis* and *Pollard* could be rendered a nullity.

Mere presence of the United States as a contending property owner should not provide an independent basis for invocation of federal law. In fact, *Wilson* recognized there was no reason that the United States' real property interests should not be treated under the same rules of property that are applied, evenhandedly to all persons in the State. *Wilson, supra,* 442 U.S. at 673.

The only other suggestion of a "principle of federal law" required to be protected by application of federal, not state, law to resolve this dispute is an oblique reference to

Hughes. But the United States' shorthanded reference to the asserted international relations rationale of *Hughes* cannot supply such a "principle of federal law" as previously demonstrated. *Supra*, pp. 15-17. Thus, federal law does not control this case.

C. Should Federal Law Control This Case, Non-Discriminatory State Law Should Be Adopted As The Federal Rule Of Decision Because There Is No "Federal Common Law" Rule Established

Assuming, *arguendo*, that under *Wilson* federal law would control this case, the Court must still determine two matters: (1) whether there exists a uniform "federal common law" rule applicable to the circumstances of this case; and (2) if not, whether there is a need to create a uniform, nationwide federal rule or to, instead, adopt state law as the federal rule of decision. *Wilson, supra*, 442 U.S. at 671-672. Since *Wilson* determined that there was no "federal common law" of accretion and avulsion, *id.* at 672,[19] the inquiry in this case is whether there is need to create such a rule.

The United States appears to urge that the only remaining relevance of *Hughes* is to answer just this question. Indeed the United States does not suggest any basis, other than its shortland reference to *Hughes*, that requires creation of a uniform, nationwide federal rule in lieu of adopting state law as the federal rule of decision in cases such as this.

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[19]Significantly, *Corvallis* also points out the "misapprehension" that there is a "federal common law" concerning littoral or riparian boundary questions. *Corvallis, supra*, 429 U.S. at 381. n. 8.

The United States' reference to the sole relevance of *Hughes* is oblique. California supposes the United States will rely on the rationale of *Hughes* that the claimed international relations implications of the determination of the location of the high-water boundary require the development of a "federal common law." But California has already established that there are no international relations implications in deciding the location of the ordinary high-water mark property boundary. *Supra,* pp. 15-17. *Hughes,* therefore, does not supply authority requiring the creation of a nationwide, uniform federal rule for determination of the effect of physical changes on the location of the boundary between the sovereign lands of California and federally-owned littoral uplands.

Finally, because this is an area that is integrally related to the constitutional sovereignty of the States, *Corvallis, supra,* 429 U.S. at 381, there is a powerful countervailing reason not to create a uniform, nationwide federal rule and instead to leave determinations of real property boundary conflicts, such as this case, to state law. Even in *Wilson,* a case where the need to create a uniform, nationwide federal rule was arguably much more compelling because of the special responsibilities of the United States to Indians, it was determined that state law would be adopted as the content of federal law. *Wilson, supra,* 442 U.S. at 676. In fact, in reaching that holding the Court specially noted that application of state law to determine real property conflicts was of special concern to the States. *Id.* at 674. Borrowing state law will avoid answering property boundary questions one way when the United States is on one side and another way for adjacent land when the United States

is not a disputing property owner. *Ibid.* This assures uniform rules of property will apply to all land in the State.

Thus, although *Corvallis* settles that the choice-of-law in property disputes is state law, the result would not differ even if the United States were correct in its claim that federal law controls this case. Even assuming this result, state law would supply the rule of decision to determine the effect of the United States' unilateral action which caused California's sovereign land to be covered up and filled in.

III

UNDER CALIFORNIA LAW, THE UNITED STATES CONCEDES THAT CALIFORNIA OWNS THE SUBJECT LAND

Since 1876, the Supreme Court has recognized:

> "It is generally conceded that the riparian title attaches to subsequent accretions to the land effected by the gradual and imperceptible operation of natural causes. But whether it attaches to land reclaimed by artificial means . . . is a question which each State decides for itself. *By the common law,* as before remarked, *such additions to land on navigable waters belong to the crown* . . . . Whether as rules of property, it would now be safe to change these doctrines where they have been applied . . . is for the several States themselves to determine . . . ." *Barney v. Keokuk,* 94 U.S. 324, 337-338 (1876) (emphasis supplied).

California follows this common law rule. The United States recognizes that under California law artificial additions to land beneath navigable waters belong to the State. Memorandum for the United States (August, 1981), page 2.

California courts have stated this rule as follows:

> "[I]t must be accepted as settled in this state that accretions formed gradually and imperceptibly, but caused entirely by artificial means . . . belong to the state, or its grantee, and do not belong to the upland owner." *Carpenter, supra,* 63 Cal.App.2d at 794, 147 P.2d at 975; *People v. Hecker,* 179 Cal.App.2d 823, 837, 4 Cal.Rptr. 334, 343 (1960).

Further, the United States does not question that if this rule is applied in this case, California is owner of the subject land. Memorandum for the United States (August, 1981), p. 2.

Thus, under California law, the application which was specifically contemplated by Congress, see *Corvallis, supra,* 429 U.S. at 371, n. 4, California owns the subject land created as deposition caused by the jetty built by the United States covered up and filled in its sovereign land below the high-water mark in front of the Coast Guard site.

IV

UNDER THE SUBMERGED LANDS ACT TITLE TO "MADE" LANDS, LANDS FORMERLY BENEATH NAVIGABLE WATERS, WAS CONFIRMED IN THE STATES; THE SUBJECT LAND IS "MADE" LAND TITLE TO WHICH HAS BEEN CONFIRMED IN CALIFORNIA

The Submerged Lands Act confirmed the States' title to "lands beneath navigable waters." 43 U.S.C. § 1311. "Lands beneath navigable waters" are defined in the Act to include "all filled in, made, or reclaimed lands which

formerly were lands beneath navigable waters." 43 U.S.C. § 1301(a)(3).

In its Complaint California alleged and the United States in its Answer admitted:

> "The construction of the jetty interfered with the natural regime of littoral sand transport along the western boundary of the Coast Guard Site. As [a] consequence, alluvion has been and is being deposited along said western boundary of the Coast Guard Site below the ordinary high-water mark, resulting in the formation of the subject land." Complaint (July, 1981), para. 9; Answer (November, 1981), para. 9.

The United States admits that jetty construction by the United States caused "fairly rapid accretion" so that "former submerged lands and tidelands [the subject land] became uplands" and that "[b]ut for the construction, improvement and maintenance of the jetties, the [subject land] would have remained submerged or tidelands . . . ." Memorandum for the United States (August, 1981), pp. 1-2; Memorandum for the United States in Support of its Motion for Judgment on the Pleadings (November, 1981), pp. 1-2.

Given the above, and the affirmance of this principle in *United States v. California, supra,* 381 U.S. at 176-177, there can be no doubt that the subject land is "made" land, title to which was confirmed in California by the Submerged Lands Act. 43 U.S.C. §§ 1301(a)(3), 1311.

V

IT IS A SETTLED RULE OF PROPERTY, CONFIRMED IN THE SUBMERGED LANDS ACT, THAT THE UNITED STATES DOES NOT RECEIVE THE BENEFIT OF DEPOSITION WHICH IT CAUSES

Even if a uniform, nationwide federal rule were to be created for situations like this, it would not, given the settled rule of property, yield a different result.

It has long been the rule that when an upland owner causes deposition, the person whose land is covered up and filled in, not the upland owner, retains the land so effected. See *Marine Ry. Co. v. United States,* 257 U.S. 47, 65 (1921); *Burns v. Forbes,* 412 F.2d 995, 997 (3rd Cir. 1969); *Bonelli, supra,* 414 U.S. at 322-323, rev'd on other grounds, 429 U.S. 363 (1977); 134 A.L.R. 467, 472. The United States has also recognized this rule of property in litigation with California. *United States v. California, supra,* 381 U.S. at 176.

The rule is based on sound equitable considerations. It hardly seems right that one, who by unilateral action causes the land of another to be covered up and filled in, should receive the benefit of such action.

The Submerged Lands Act, by including within the definition of the lands beneath navigable waters, title to which was confirmed in the States, "all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters . . . ," 43 U.S.C. § 1301(a)(3), recog-

nized and confirmed this rule of property.[21] There is no doubt that the subject land is "made" land. *Supra*, pp. 24-25.

Thus, under the settled rule of property, recognized and confirmed in the Submerged Lands Act, California should be held the owner of the subject land.

VI

THERE IS NO SUPPORT FOR THE CONTENTION BY THE UNITED STATES THAT JETTY CONSTRUCTION FIXED THE LOW-WATER MARK ADJACENT TO THE COAST GUARD SITE; THE 1947 CALIFORNIA DECISION AND SUBSEQUENT DECISIONS OF THE COURT CONFIRMED CALIFORNIA'S TITLE TO ITS SOVEREIGN LANDS LYING ABOVE THE LOW-WATER MARK AS SUCH MARK WAS MODIFIED BY EITHER NATURAL OR ARTIFICIAL PHENOMENA AND THEREBY UPHOLD CALIFORNIA'S TITLE TO THE SUBJECT LAND

The United States asserts that the subject land is not sovereign tidelands, but federal property because a portion was once submerged. The United States argues that by the process of deposition caused by the United States, this submerged portion was covered up and filled in and thereby became upland. This assertion by the United States

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[21] An equally plausible interpretation is that by confirming title to lands beneath navigable waters in the States and those persons who were on June 5, 1950, entitled thereto under *state law* in 43 U.S.C. § 1311(a) Congress also recognized that some States, such as California, followed this rule of property and specifically avoided interference with such expectations.

depends fundamentally on the conclusion that when jetty construction by the United States interfered with the natural littoral sand transport along the Pacific Ocean shoreline of the Coast Guard site, not only was the upland boundary fixed in location, but so was the boundary between the lands over which the United States asserted paramount rights and the sovereign lands of California, the ordinary low-water mark.

The United States argues that when deposition occurred below the "fixed" boundary between the lands over which it asserted paramount rights and California's sovereign lands, it occurred on lands "owned" by the United States.[22] Since such once-submerged lands eventually became covered up and filled in, lie above the high-water mark, and were no longer lands beneath navigable waters on March 22, 1953, such lands, so the argument goes, were not conveyed to California by virtue of the Submerged Lands Act. Memorandum for the United States (August, 1981), p. 7.

This position is contradicted by the holding and decree of this Court that the ordinary low-water mark along California's coast was an ambulatory line, modified by either natural or artificial phenomena. *United States v. California, supra,* 381 U.S. at 176-177; *United States v. California* (Supplemental Decree), *supra,* 382 U.S. at 449.

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[22]The United States' title in such submerged lands has never been quieted, *United States v. California, supra,* 332 U.S. at 38, 44 (Frankfurter, J., dissenting); *United States v. Texas, supra,* 339 U.S. at 724 (separate views of Frankfurter, J.), only its "paramount rights" were upheld, *United States v. California, supra,* 332 U.S. at 38.

Thus, as the deposition occurred, it was deposited below the high-water mark on California's land and pushed the low-water mark farther and farther seaward. No deposition occurred on lands "owned" by the United States, all of which would lie seaward of this ambulatory low-water mark.

Further the very claim made here by the United States was disposed of in *United States v. California, supra,* 381 U.S. 139.

> "When this case was before the Special Master the United States contended that it owned all mineral rights to lands outside inland waters which were submerged at the date California entered the Union, even though since . . . reclaimed by means of artificial structures. The Special Master ruled that lands so enclosed or filled belonged to California because such artificial changes were clearly recognized by international law to change the coastline. . . .
>
> "[And the United States has since admitted] the Submerged Lands Act recognized and confirmed state title within all artificial as well as natural modifications to the shoreline prior to the passage of the Act. . . ." *Id.* at 176.

Even the 1947 California decision did not question the State's title to tidelands, lands lying above the ordinary low-water mark but below the ordinary high-water mark. The complaint filed by the United States alleged, in pertinent part, that the United States was the "'. . . owner in fee simple of, or possessed of paramount rights in and powers over, the lands . . . lying seaward of the ordinary low-water mark on the coast of California . . .'" *United States v. California, supra,* 332 U.S. at 22. The Court

also specially noted that "[t]he Government does not deny that under the *Pollard* rule . . . California has a qualified ownership of . . . tidelands down to the low-water mark." *Id.* at 30. Thus, under the 1947 California decision, as reinforced by subsequent decisions, the State's title to its sovereign lands lying above the ambulatory low-water mark, but below the ordinary high-water mark has never been in question.

Further, the effect of the United States' argument, if granted any credence,[23] would be to create a strip of federally "owned" beach front property landward of the coastline, as defined in the Submerged Lands Act and subsequent cases construing the Act, along some of the most valuable, popular beach areas in California.

For example, it is well known that many acres of land have artificially accreted along and formed the beaches in Santa Monica Bay. *Carpenter, supra,* 63 Cal.App.2d at 776-779, 142 P.2d at 906-907; *Hecker, supra,* 179 Cal.App. 2d at 826, 832-833, 4 Cal.Rptr. at 340-341; *Muchenberger v. City of Santa Monica,* 206 Cal. 635, 638-639, 275 P. 803, 804-805 (1929). These artificially accreted lands have been the subject of California appellate court decisions which affirmed the rule that artifically accreted lands belong to the State and not to the upland owner. *Carpenter, supra,* 63 Cal.App.2d at 794, 147 P.2d at 975; *Hecker, supra,* 179 Cal.App.2d at 834-835, 4 Cal.Rptr. at 340-341. Adoption of the argument of the United States would negate these

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[23]But see fn. 18, supra, p. 19. This argument also ignores the fact that the Submerged Lands Act confirmed California's title to the subject land as "made lands." Supra, pp. 24-25; 43 U.S.C. sections 1301(a)(3), 1311.

holdings and public and private expectations based thereon and create a multi-layered ownership of beach-front lands. Thus, the upland owner would own to the ordinary high-water mark in its last natural position; the State would own land between such ordinary high-water mark and the ordinary low-water mark in its last natural position; the United States would own the land between such ordinary low-water mark and the present ordinary low-water mark; and the State would own all lands seaward of such low-water mark out to three miles. Such a Linzer torte scheme of ownership flies in the face of common sense and sound land management practices.

Finally, adoption of this argument would conflict with the Submerged Lands Act. That Act not only confirmed the States' title to lands beneath navigable waters (defined generally as lands covered by tidal waters up to the line of mean high tide, 43 U.S.C. § 1301(a)(2)), but also the title of persons, who, on June 5, 1950 were entitled to such lands " . . . under the law of the respective States in which the land is located . . ." 43 U.S.C. 1311(a). Since under California law the State or its grantees were entitled to such artificially accreted lands, *Carpenter, supra,* 63 Cal. App.2d at 794, 147 P.2d at 975, *Hecker, supra,* 179 Cal. App.2d at 834-835, 4 Cal.Rptr. at 340-341, the position of the United States in this case would conflict with the plain expression of Congress in 43 U.S.C. section 1311(a).

Thus, although the boundary between the fast lands owned by the United States and California's sovereign land was fixed by the activities of the United States, the boundary between California's sovereign lands and the

land over which the United States asserted paramount rights and which have since been confirmed in California continued to move as deposition occurred on the State's sovereign lands below the high-water mark. This process created a band of lands that, although now physically above the high-water mark, are in legal character tidelands. And under the 1947 California decision and *United States v. California, supra*, 381 U.S. at 176-177, such lands are recognized to be the sovereign lands of California in which California holds absolute title free of any federal principle of land titles.

CONCLUSION

There is no factual dispute. Artificial deposition on the sovereign land of California unilaterally caused by the United States and the United States' assertion that federal common law should be created to control the decision concerning the effect of this deposition on the boundary of California's sovereign land should not be allowed to defease California of its essential rights, its sovereign land and its right to apply California law to determine ownership and boundary questions regarding such land. California's title to such land is absolute and cannot be defeased by application of "federal common law." Thus, the United States' motion for judgment on the pleadings should be denied and summary judgment as requested by California should be granted because under California law, there is no question that California is the owner of the subject lands.

Such a judgment will preserve the fine balance struck in the Constitution between the powers of the state government and the powers of the federal government, a balance

which assures that each government, federal and state, is supreme within its own sphere. Here, one government, the United States, seeks to invade what has always been held the province of the other, ownership of state sovereign land and the right to apply state law to determine boundary and title disputes concerning such land. To honor that constitutionally-mandated balance, it should be affirmed that California law governs the sovereign land boundary question presented in this case.

Dated: January 13, 1982.

Respectfully submitted,

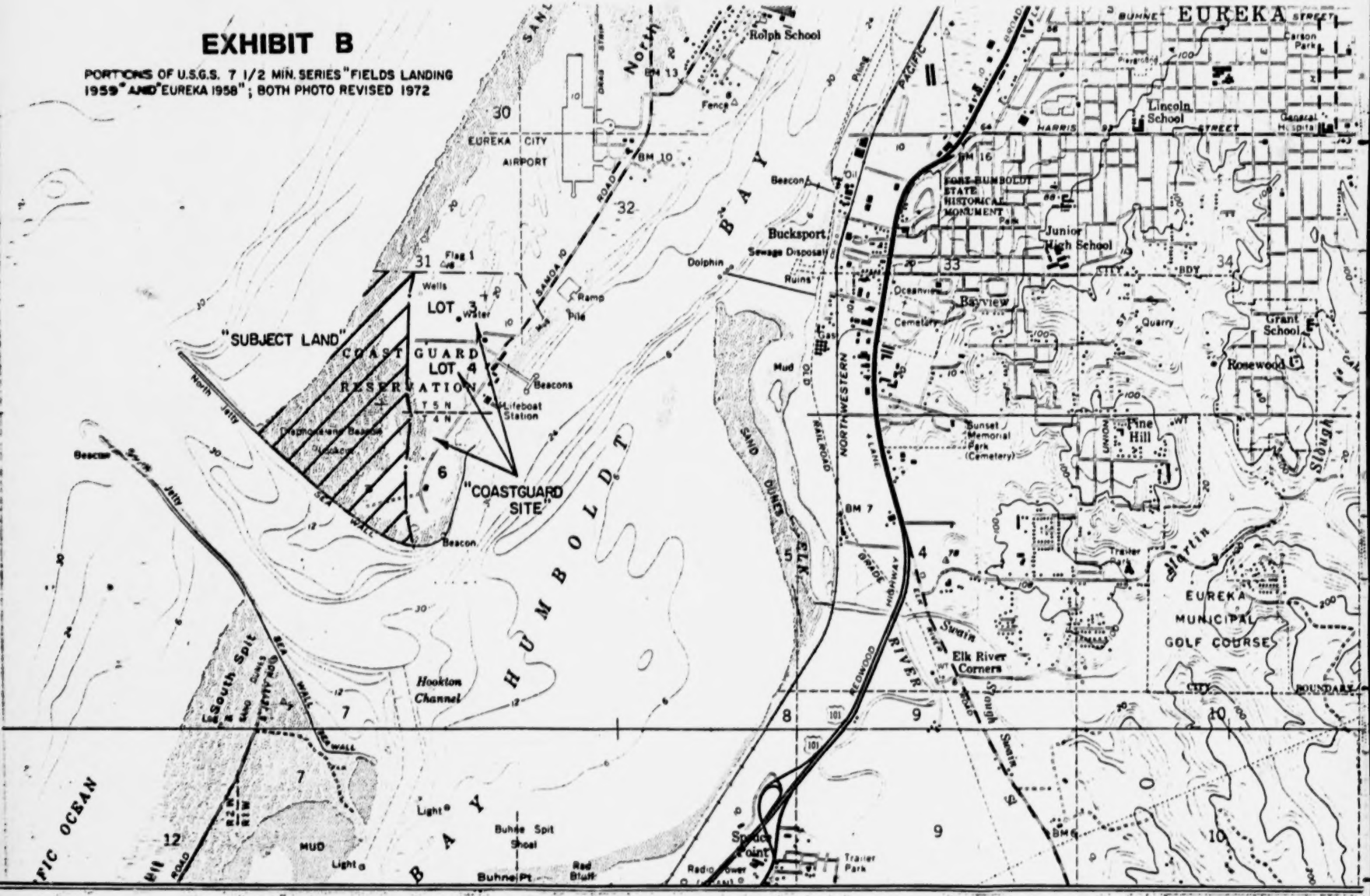
GEORGE DEUKMEJIAN
Attorney General of the State of California
N. GREGORY TAYLOR
Assistant Attorney General
DENNIS M. EAGAN
BRUCE S. FLUSHMAN
Deputy Attorneys General

DENNIS M. EAGAN

BRUCE S. FLUSHMAN
Counsel for Plaintiff, State of California, ex rel. State Lands Commission

EXHIBIT B

PORTIONS OF U.S.G.S. 7 1/2 MIN. SERIES "FIELDS LANDING 1959" AND "EUREKA 1958"; BOTH PHOTO REVISED 1972



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No. 89, Original

In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF CALIFORNIA, EX REL.,
STATE LANDS COMMISSION, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON CROSS-MOTIONS FOR JUDGMENT

BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the State or the United States today owns former submerged seabed and tidelands off the open seacoast which, long before the Submerged Lands Act of 1953, became uplands attached to federal littoral lands by accretion indirectly attributable to artificial causes.

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STATE OF CALIFORNIA, EX REL.,
STATE LANDS COMMISSION, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON CROSS-MOTIONS FOR JUDGMENT

BRIEF FOR THE UNITED STATES

JURISDICTION

The original jurisdiction of this Court is properly invoked under Article III, Section 2, of the Constitution, 28 U.S.C. 1251(b) and 28 U.S.C. 1346(f), as construed in *California* v. *Arizona*, 440 U.S. 59, 65-68 (1979). The sovereign immunity of the United States has been waived by 28 U.S.C. 2409a(a). 440 U.S. at 63-65. By Order of October 5, 1981, the Court has granted the State of California leave to file the Bill of Complaint.

STATEMENT

The State of California filed its original Bill of Complaint on July 7, 1981, together with a motion for leave to file. Pursuant to the Court's Order of October 5, 1981, the United States filed its Answer

on November 2, 1981, admitting the factual allegations of the Complaint, denying that the State is entitled to the relief sought, and praying for judgment quieting federal title to the acreage in dispute. In accordance with Orders entered November 30 and December 7, 1981, the case is before the Court on the cross-motions of the parties, a Motion for Judgment on the Pleadings filed by the United States on November 2, 1981, and a Motion for Summary Judgment filed by California on November 17, 1981.

1. California claims as "sovereign lands" some 184 acres bordering the Pacific Ocean north of the channel entrance to Humboldt Bay in the northern part of the State. See Exhibit B to the Complaint. The United States, on the other hand, asserts that the disputed acreage is federal land, part of a Coast Guard Reservation comprising the southern portion of the North Spit (or Samoa Peninsula) sheltering the Bay. Today, all the area at issue is upland, lying shoreward of the high water line.

As the pleadings disclose, the relevant facts are not disputed. We have previously summarized the essential history of the contested acreage, as follows:

> (a) At the time of California's admission to the Union in 1850, and for half a century thereafter, most of the lands now claimed were permanently submerged below the Pacific Ocean and some small part of them were tidelands—uncovered at low tide and submerged at high tide—adjacent to ocean-fronting uplands owned by the United States;
>
> (b) Some years after California statehood, the United States withdrew the adjacent uplands from the public domain to create a Coast Guard Reservation, whose boundary on the Pacific Ocean was the line of mean high water;

(c) As a result of the construction by the United States of jetties at the turn of the century, fairly rapid accretion occurred on the ocean side of the Coast Guard Reservation, so that the former submerged lands and tidelands in suit became uplands, the process being complete well before 1953;

(d) But for the construction, improvement and maintenance of the jetties, the lands in suit would have remained submerged or tidelands, approximately as they were in 1850 and for the next half century.

In our view, it would serve no useful purpose to elaborate these facts. We have no objection, however, to the Court's taking judicial notice of the supporting Exhibits tendered by California with its Complaint, which detail and illustrate the geographical changes. Exhibits A, C and D.[1] We stress only two points. First, although the accretion would not have occurred except for the construction of the jetties, the land in dispute was formed by natural wave and tidal action accumulating sand against the shore and the northern jetty, not by an artificial land fill, drainage or other deliberate human activity. Second, the process of accretion, albeit "fairly rapid," consumed several years and was effected little by little.

2. The present controversy grew out of a proposal by the Coast Guard to construct and install a watchtower on the disputed land. In December 1977, the Commander of the local Coast Guard District applied to the California Lands Commission for a permit to

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[1] Nor, indeed, do we object to the Court's noticing the other documents submitted by the State in the same volume, albeit their relevance is denied.

that end. Exhibit E. We need not explore whether this was done on the mistaken view that the site was State property or merely to avoid controversy. At all events, the proposed permit document forwarded by the State in May 1978 (Exhibit F) expressly disclaimed any admission by either party whether the affected land was owned by the State or the United States. *Ibid*, Proposed Permit, at 3, § 2, para. 1. A few days later, the Bureau of Land Management of the Department of the Interior formally advised the Coast Guard and the California Commission that the United States claimed the disputed acreage as accretion. Letter of June 5, 1978, attached to Exhibit G. In further correspondence, the parties adhered to their respective positions (Exhibits G and H), and the proposed permit was never executed.

3. In its Complaint, California alleges no estoppel against the United States.[2] Rather, it claims the acreage as formerly submerged lands and tidelands, characterized "sovereign lands," as to which "California became vested with absolute title * * * free of any federal claim of title or federal principle of land title" "[u]pon its admission to the Union * * * or as confirmed by virtue of the Submerged Lands Act." Complaint, paras. 4 and 5, Motion at 28. The prayer is that the State's title be quieted and that the United States be compelled to execute a quitclaim deed in favor of the State. Complaint Prayer, paras. 1 and 2, Motion at 30.

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[2] Such a contention would, of course, be frivolous. See *United States* v. *California*, 332 U.S. 19, 39-40 (1947).

ARGUMENT

Introduction And Summary

The lands at issue are today all upland, above the line of mean high water. They constitute accretion to reserved lands of the United States, and result from natural forces, albeit deflected by artificial works. For the most part, the area in question was, in 1850, completely submerged below the Pacific Ocean. A small strip, of undefined dimensions, was then tidelands—uncovered at low tide but submerged at high tide. Although California, thus far, has not differentiated the basis of its claim to each portion of the disputed parcel, we deem it appropriate to deal separately with the former submerged lands and the former tidelands.

Preliminarily, however, we stress one common point. The controversy here is between a state and the Nation. Accordingly, the question is not how the State may fashion its property law to govern its own citizens. Ultimately, the issue is whether the area in dispute, claimed by the United States, ever was, or is today, subject to disposition in accordance with state law rules.

1. With respect to the lion's share of the area in dispute—the former submerged lands—our basic submission is simple. No part of the marginal seabed was conveyed to the State under the Equal Footing Doctrine and California can claim title to such lands only under the Submerged Lands Act of 1953. That grant, however, embraced only the bed of the marginal sea as geographical reality then defined it, in accordance with uniform federal statutory standards. Since the area in dispute had long ceased to be submerged in 1953, it was unaffected by the Act. Having become attached to lands of the United States,

the former seabed area has at all times remained part of the federal domain and State law property rules accordingly cannot control.

2. Assuming that tidelands along an open seacoast are governed by the *Pollard* rule (*Pollard's Lessee* v. *Hagan*, 44 U.S. (3 How.) 212 (1845))—a question not wholly settled—it grants only what the Submerged Lands Act confirmed: an ambulatory title, shifting with geographical changes. On the open sea, any other principle would produce inequitable and unworkable results. At all events, when the United States is the owner of the land on both sides of a strip of former tidelands, the uniform federal rule, embodied in statute, should be followed, and the consequence is that artificially caused accretion inures to the upland owner, the United States.

A. The Former Submerged Land

Most of the acreage in dispute was permanently submerged when California entered the Union in 1850, and lay well within the outer political boundaries of the State. But, being part of the bed of the Pacific Ocean off an open coast, that land plainly did not underly State "inland" or "internal" waters, as those terms are understood in national and international law. Long before the passage of the Submerged Lands Act (43 U.S.C. 1301 *et seq.*) in 1953, moreover, the formerly submerged acreage had, by a more or less gradual process of accretion ultimately attributable to artificial causes, become permanent upland, attached to coastal lands of the United States, retained by the national sovereign in the California Enabling Act and later set aside as a Coast Guard Reservation. On these facts, we submit, California can claim no title to the formerly submerged acreage.

The State's contention, as we understand it, rests on two premises: (a) that the offshore acreage was, at one time, "sovereign land" of California; and (b) that State law controls the question whether such sovereign land remains State property or inures to the adjacent upland owner—whether the United States or a private proprietor—when it ceases to be submerged due to "artificial" accretion. In our view, both propositions are wrong. But, since each is essential to the conclusion, it is enough for present purposes if we fault the major premise.

Even California does not suggest that it acquired title to the formerly submerged lands in dispute under some self-serving rule of State law. There are only two possible sources for California's claim: the Equal Footing Doctrine or the Submerged Lands Act. We consider them in that order.

1. Whatever else is arguable, it has never been suggested that the Equal Footing Doctrine, insofar as it vests in the states, upon their admission to the Union, the beds and banks of navigable waters, has a different effect in each state, depending on its laws. Since the rule is one of federal constitutional law, and one mandating equality of treatment, it obviously must have a uniform meaning in all the states. Of course, each state may at any time renounce any portion of the constitutional grant. But no state is free to *expand* its original scope by adopting a more generous definition of "navigable water," or "inland water," or "bed" or "bank." At least the original boundaries of the "equal footing" grant are fixed by uniform federal rule. So much, indeed, seems firmly established (if it was ever doubted) by *Oregon Ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374, 376 (1977); *id.* at 385 (Marshall, J., dissenting).

It follows that California, like all other states, acquired at statehood only such "sovereign" submerged lands as are embraced by the Equal Footing Doctrine elaborated in *Pollard's Lessee* v. *Hagan*, *supra*, [illegible] and its progeny. And it is long settled —as it happens, first in a case involving California—that only "inland" water bottoms are included, specifically not the seabed below the line of low water off an open coast. *United States* v. *California*, 332 U.S. 19 (1947). See, also, *United States* v. *Louisiana*, 339 U.S. 699 (1950); *United States* v. *Texas*, 339 U.S. 707 (1950). Thus, unless the federal rule has been altered, California never acquired the formerly submerged lands in suit.

2. It is presumably suggested that such a change of law occurred with the passage of the Submerged Lands Act in 1953. The short answer is that the statute came too late to affect the former seabed acreage in dispute, which, long before 1953, had become upland and thus beyond the reach of the Submerged Lands Act. That is the end of the matter unless it can be demonstrated that Congress retroactively "overruled" this Court's first *California* decision limiting the *Pollard* rule to lands underlying inland waters, or otherwise granted the coastal States title to formerly submerged seabed.

a. Since the Court's holding in the first *California* case, followed in the first *Louisiana* and *Texas* cases, resolved a question of federal *constitutional* law—the scope of the Equal Footing Doctrine—Congress could not overrule it if it chose. At all events, the Court has explicitly held that the 1953 statute "did not impair the validity of the [pre-Submerged Lands Act] *California*, *Louisiana*, and *Texas* cases," but was a "constitutional exercise of Congress' power to dispose of federal property." *United States* v. *Louisi-*

ana, 363 U.S. 1, 7, 20 (1960). See also, *id* at 86 (Black, J., dissenting); *Alabama* v. *Texas*, 347 U.S. 272, 273-274 (1954); *id.* at 275-277 (Reed, J., concurring); *United States* v. *Louisiana* (Texas boundaries), 389 U.S. 155, 156-157 (1967); *Texas Boundary Case*, 394 U.S. 1, 2 (1969); *United States* v. *Maine*, 420 U.S. 515, 524-526 (1975); *United States* v. *Louisiana*, 446 U.S. 253, 256, 268 (1980). Nor has the Court itself changed its view. See *United States* v. *Maine*, *supra*.

b. What is more, attributing any different objective to the Submerged Lands Act would raise additional constitutional problems. The statute was sustained as a disposition of *federal* property, a matter over which Congress has plenary power under Article IV. But if this Court's holding that the territorial seabed did not inure to the States were deemed reversed retrospectively, it would be most difficult to defend critical provisions of the Act, and its corrollary, the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.* Presumably, Congress cannot withhold any part of what the Constitution itself granted to the states. Yet, the Submerged Lands Act purports to limit the states' share of the seabed to three miles from present coastlines along the Atlantic and Pacific Oceans, regardless of historic boundaries (*United States* v. *California*, 381 U.S. 139, 159-160, 163-167, 174, 176-177 (1965); *United States* v. *Maine*, *supra*, 420 U.S. at 519-527), and to a maximum of three leagues from modern coastlines in the Gulf of Mexico, even when, due to erosion, the historic boundary was more seaward (*Texas Boundary Case*, *supra*, 394 U.S. at 4-6). In every case, moreover, the statute exempts from the grant—without compensation—any area otherwise within the state's territorial seabed effectively appropriated by

the United States at any time before 1953. 43 U.S.C. 1313; see *United States* v. *California*, 436 U.S. 32, 38-41 (1978).

So, also, if the Submerged Lands Act were viewed as merely implementing a grant already made by the Constitution itself, it seems doubtful that the Equal Footing principle would condone a scheme under which Gulf States alone were free to establish "historic" claims up to nine miles while the same privilege was denied to the states bordering the Atlantic or the Pacific. See *United States* v. *Texas*, *supra*, 339 U.S. at 717-720.

3. To be sure, although it could not rewrite the Equal Footing Doctrine, Congress might have achieved much the same result by exercising its powers under the Property Clause. Thus, insofar as uplands then in federal ownership were concerned,[3] Congress might have determined to cede them to the states where the acreage in question had, at statehood, formed part of the seabed within three miles of the historic shoreline. Or, conceivably, Congress might have made such a contingent grant, affording each state the opportunity, if it chose, to accept the offer by fashioning its rules of accretion and reliction accordingly. But there is not the slightest basis for attributing any such extraordinary objective to the Submerged Lands Act.

a. No doubt, within constitutional limits and subject to exceptions enacted as a matter of policy, the

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[3] Obviously, the Property Clause did not authorize Congress to convey to the states accretions then in private ownership. Nor could Congress, any more than the states, accomplish that result without payment of just compensation. See *Hughes* v. *Washington*, 389 U.S. 290, 294-298 (1967) (Stewart, J., concurring).

Congress of 1953 was intent on "confirming" an earlier understanding that the *Pollard* rule applied to the territorial sea, notwithstanding this Court's contrary decisions. But it does not follow that the states were now to regain lands long since emerged from the seabed and now part of the mainland. That is simply not what the *Pollard* rule was then believed to mean.

The fact is that, until *Oregon Ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, *supra*, was decided in 1977, the prevailing doctrine was that *Pollard* recognized state title to lands underlying navigable waters—as well as shores and banks—subject to the vagaries of accretion, reliction and erosion. Only when a sudden "avulsive" change occurred, whether induced by artificial or natural causes, was the legal status quo ante preserved. Otherwise, the state's "sovereign" title to navigable water bottoms expanded or contracted as the boundaries of the water body gradually shifted over time, regardless whether the indirect cause could be traced to man-made works. Nor was it supposed that any state could, by enacting special rules, defeat the principle of ambulatory navigable water boundaries. There was assumed to be a uniform federal—indeed, constitutional—law governing accretion, reliction, erosion and avulsion, which defined state sovereign title within navigable waters. Of course, any state was deemed free to relinquish any part of what the Equal Footing Doctrine secured, but it could not expand the scope of the grant. See *Bonelli Cattle Co.* v. *Arizona*, 414 U.S. 313, 318-321, 322-327 (1973). See, also, *Hughes* v. *Washington*, 389 U.S. 290, 293 (1967); *Borax, Ltd.* v. *Los Angeles*, 296 U.S. 10, 22 (1935); *Shively* v. *Bowlby*, 152 U.S. 1, 35 (1894); *County of St. Clair* v. *Loving-*

ston, 90 U.S. (23 Wall.) 46, 68 (1874); *New Orleans* v. *United States*, 35 U.S. (10 Pet.) 662, 717 (1836).

However erroneous this view in light of *Corvallis*, there is no reason to doubt that the Members of Congress, like the Members of this Court, so understood the *Pollard* rule in 1953. Presumably, Congress would have legislated accordingly had it believed *Pollard*, as applied both to navigable inland waters and the marginal sea, vested an indefeasible title to all lands submerged at statehood, regardless of any later geographical changes. But, at this late date, it would be quite wrong to construe the Submerged Lands Act as implementing a view of the *Pollard* doctrine only accepted in this Court more than two decades after Congress acted.

b. At all events, whether or not Congress was attempting to tailor its grant to the *Pollard* rule, as then understood, it is plain that the Submerged Lands Act actually accomplishes an ambulatory conveyance, reflecting current geographical reality and not reconstructed historical boundaries. We need look no further than the definition of "lands beneath navigable waters" incorporated in the Act. 43 U.S.C. 1301 (a).

That term, so far as applicable to the beds and banks of nontidal waters, is expressly restricted to lands "which *are* covered by nontidal waters * * * up to the ordinary high water mark *as heretofore or hereafter modified by accretion, erosion, and reliction.*" 43 U.S.C. 1301(a)(1) (emphasis added). And the same rule is effectively mandated for tidal areas, including the marginal sea, by the grant of "lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide," in the present tense, evidently intending, here also, a line

modified from time to time by accretion, erosion and reliction. 43 U.S.C. 1301(a)(2).[4]

There is, moreover, an express exception that proves the rule. The final provision of the definition we have been considering includes "filled in, made, or reclaimed lands which *formerly* were lands beneath navigable waters, as hereinabove defined." 43 U.S.C. 1301(a)(3) (emphasis added). Obviously, this stipulation is redundant if the grant already encompassed all lands submerged at statehood, regardless of intervening geographical changes. In effect, this clause makes clear that deliberate artificial extensions of the mainland will be treated as "avulsive" changes

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[4] Former Solicitor General Cox, in a formal Opinion for the Secretary of the Interior, approved by the Attorney General, explained the meaning of 43 U.S.C. 1301(a)(2) in words we gladly borrow (42 Op. Att'y Gen. 241, 262 (1963)):

> The terms "the line of mean high tide" and "the coast line" connote a boundary line constantly changing as a result of accretion, erosion and reliction. One may fairly ask why Congress did not make this meaning clear in subdivision 2 as it had done in subdivision 1 by speaking of the line "as heretofore or hereafter modified * * *." The answer is twofold. First, the connotation of the phrases "line of mean high tide" and "coast line" was thought too clear to require the additional explanation. Second, the prior words of subdivision 2 did not give rise to the same need for negativing the idea of unvarying limits that might have been supposed to have been created by subdivision 1 if the reference to changes by accretion, erosion and reliction were omitted. Subdivision 1 refers to two dates, one for the purpose of testing navigability and the other, submergence. From this reference it might have been inferred that the line was also fixed as of the latter date. In subdivision 2 no dates, past or present, were necessary; hence there was no comparable inference to dispel.

which, unlike gradual accretion or reliction, do not affect water boundaries.

c. It hardly needs saying that these provisions, defining the present and future scope of the congressional grant, are not subject to expansion at the whim of the affected state. Congress having expressly determined that past and future accretions are excluded, no state can alter that result. Nor can any state unilaterally increase its grant to include some accretions by applying its own narrower definition of that term. Plainly, this federal statute must be read to treat all states alike, defining the limits of the grant in accordance with uniform federal rules. The "ordinary high water mark," the "line of mean high tide," the "line of ordinary low tide," and the "line marking the seaward limit of inland waters" (see 43 U.S.C. 1301(a)(1) and (2), (c)), all have the same meaning in all states, regardless of local property law concepts. Indeed, this Court has so held with respect to the last two terms—the ingredients of the "coast line"—adopting rules of international law for the purpose. *United States* v. *California*, *supra*, 381 U.S. at 163-166, 175-177; *Louisiana Boundary Case*, 394 U.S. 11, 19-35 (1969). It would be absurd to follow a different approach for identifying a high water line, or its ingredients, including accretion.

d. It remains only to note that California here concedes that, as a matter of federal law, the exposure of the formerly submerged lands in dispute, although indirectly attributable to man-made structures, constitutes "accretion" which inures to the upland owner. That is, of course, correct. *County of St. Clair* v. *Lovingston*, *supra*, 90 U.S. (23 Wall.) at 66; *Bonelli Cattle Co.* v. *Arizona*, *supra*, 414 U.S.

at 324, 327. The State accordingly cannot claim the areas in question as "filled in, made or reclaimed lands," terms obviously inapposite to describe the natural and more or less gradual process by which sand accummulated along the shore, albeit the ultimate cause was a jetty affecting the action of the sea.[5]

4. With respect to lands underlying *inland* navigable waters, state title may reach beyond the limits defined in the Submerged Lands Act, because that statute cannot restrict a constitutional grant or reservation at statehood. That is, in effect, the holding of *Corvallis*, which recognizes that a state may, by local law rule, retain once submerged lands that the Submerged Lands Act does not embrace. But no similar result is possible along the open sea. In light of the consistant holdings of this Court since the first *California* case that coastal states held no title to the seabed, the *only* basis for a state claim to lands now or previously underlying the open sea is the Submerged Lands Act of 1953. And, as we have seen, that grant does not encompass former water bottoms which, through accretion, have become attached to the upland.

We need proceed no further since California's whole argument is that "sovereign State lands" do not lose their character as such by "artifically caused" accre-

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[5] We note that the Opinion of former Solicitor General Cox already cited (note 4, *supra*) holds that the term "made" in Section 1301(a)(3) embraces naturally-formed islands—a discrete question not presented here. 42 Op. Att'y Gen. at 241-259, 265-267. At the same time, however, the Opinion firmly rejects the suggestion that accretion to the *mainland*, whether or not indirectly attributable to artificial causes, is included in the Submerged Lands Act grant to the states under this provision. *Id.* at 259-265, 266-267.

tion, and the sovereign title asserted is said to have vested at statehood when the lands were submerged beneath the open sea. That faulty premise defeats the claim as made. Nevertheless, it may be well briefly to address an entirely separate proposition: that California's title rests not on the formerly submerged status of the acreage in dispute, but, rather, upon its present character as upland, "new" land not reserved by the United States in the California Enabling Act and therefore open to disposition by the State in accordance with its own law. That is perhaps the idea underlying the concurring opinion in *Hughes* v. *Washington*, *supra*, 389 U.S. at 295.

This is not an occasion to debate the general question whether state or federal law governs accretions to the mainland along an open coast. For present purposes, it suffices to deal with the claim that a state can appropriate to itself former federal submerged lands which have become attached to uplands at all times in federal ownership. On its face, the proposition is a little startling. But, at all events, we may safely rest on a provision of the Submerged Lands Act which expressly preserves federal title to "all accretions"—presumably past and future—attaching to "lands expressly retained by or ceded to the United States when the State entered the Union", as well as "all lands filled in, built up, or otherwise reclaimed by the United States for its own use." 43 U.S.C. 1313(a).[6] While these are, in terms, exceptions to

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[6] Although "accretions" are expressly mentioned only in connection with federal "acquired lands," it seems obvious the same principle equally applies to "reserved lands" of the United States, also excepted from the grant by Section 5(a) of the Act (43 U.S.C. 1313(a)). Once again, we borrow from

the grant made in 1953, they surely also reflect the authoritative congressional interpretation of the "disclaimer clauses" in the Enabling Acts for the "public land" states as encompassing future accretions to reserved coastal acreage. In the absence of any contrary indication, we must accept this declaration by Congress as dispositive.

5. Finally, we may notice the anomalies and inequities California's submission would produce. For the purpose of measuring its three-mile grant under the Submerged Lands Act, California, like all other states, has started from the present "coastline," which along the open coast is the low water line as extended seaward by accretion or reliction, whether

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former Solicitor General Cox's Opinion (42 Op. Att'y Gen. at 264):

> There can be no doubt that Congress intended each of the various categories of lands excepted by section 5(a) to include accretions. The terms of section 5(a) make this clear. The customary rights of landowners are set forth in full in the first of the several exceptions listed in section 5(a). Thus, it speaks of "all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon * * *." Each of the other exceptions speaks simply of "all lands." Obviously, the more comprehensive word "lands" was used instead of "tracts or parcels of land" and the explicit reference to accretions, resources and improvements was omitted in order to avoid repetition. There is no reasonable basis for any other conclusion. Congress would not have limited its exceptions of "all accretions thereto, resources therein, or improvements thereon" to lands "lawfully and expressly acquired by the United States" from any State or its grantees and then denied them where the lands were "expressly retained" or "acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity * * *."

due to natural or artificial causes, and even directly by jetties or other coast protective works. *United States* v. *California*, *supra*, 381 U.S. at 176-177; 382 U.S. 448, 449 (1966) (Supplemental Decree); 432 U.S. 40, 41-42 (1977) (Second Supplemental Decree). See, also, *Louisiana Boundary Case*, *supra*, 394 U.S. at 40-41 n.48, 48-49 n.64; *United States* v. *California*, 447 U.S. 1, 5-8 (1980). Yet, the State also claims to retain the formerly submerged acreage on the landward side. And, while insisting on keeping lands emerging from the seabed due to artificially caused accretion or reliction, California, so far it appears, does not forego new seabed formed by erosion attributable to like causes. That is, indeed, attempting to have one's cake and eat it too.

What is more, the results of the State's argument are incongruous and impractical. A uniform federal rule would be applied in fixing the low water line, which follows the shifting actuality regardless of cause, and, at the same time, varying state law rules must be adopted in setting the high water line along the same coast, including a rule that departs from current reality when geographical changes are indirectly traceable to man-made construction. As we have noted, this Court has determined that the "coastline" relevant for purposes of the Submerged Lands Act is the baseline recognized in international law, which is ambulatory, following geographical realities regardless of cause, and which, along the open coast, is marked on current nautical charts. That is, of course, a practical standard. But the virtue of that relatively simple rule would be defeated if it were necessary also, in every case, to plot the historic line of mean high water or the fictional high water line that unaided nature might have created. In the pres-

ent instance, such a reconstruction may be possible. In others, however, the task simply would not be feasible, or would burden the courts—including this Court—with endless litigation. One need only contemplate the varying contentions that would confront us if we had to redraw the Louisiana coast discounting the effect of coast protective works, jetties, landfill, channel dredging and all other human activities that have indirectly changed the shoreline.

There are complexities enough in this matter without inventing others. Especially so when the obvious solution works no injustice to the coastal states. Whenever the United States, in the exercise of the federal navigational servitude, builds jetties or other works along the coast, it is presumptively directly *benefiting* the state affected, as well as the Nation as a whole. Sometimes, to be sure, an incidental consequence (after 1953) is to deprive the state of some submerged acreage. But that is normally compensated under the Submerged Lands Act by pushing outward the boundary of the three-mile belt, usually creating a "bulge" of new state seabed larger than the acreage lost adjacent to the shore.[7] In some cases, moreover, the consequence is to create a new pocket of inland waters, which gives the state both a fuller title near shore and a more seaward baseline from which to measure its three-mile belt of territorial sea. Plainly, there is no inequity involved.

6. In sum, insofar as we are concerned with formerly submerged land, the present case does not

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[7] Thus, for instance, a mile-long jetty, fifty feet wide, jutting out at right angles from a straight coast "appropriates" less than six acres of submerged land but produces a "bulge" of additional state territorial seabed comprising some 2,600 acres.

require resolution of the continuing viability of *Hughes* v. *Washington*, *supra*, or even the question suggested by *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979), whether to adopt state law as the federal rule when the United States is the upland landowner. At the time the acreage in dispute was submerged, it was federal property and it so remained when it emerged and became attached to adjoining land of the United States. The Submerged Lands Act came too late to convey title to California and there is no other basis for a State claim. It is of no concern to California whether the accreted lands should be viewed as a distinct parcel of the public domain or whether a formal "withdrawal" is necessary to subject the area to Coast Guard jurisdiction. In no event does the State itself have any proprietary claim there.

B. The Former Tidelands

A relatively small portion of the parcel in dispute apparently covers what were, at statehood, tidelands —the "foreshore" of the sea, uncovered at low tide but submerged at high tide. Although most of what has been said with respect to the former submerged lands is equally applicable here, the status of the former tidelands calls for some additional comments.

1. It has been assumed that the Equal Footing Doctrine, of its own force, vested in each of the coastal states, upon its admission to the Union, title to all tidelands, even on the open coast. If that is correct, the question arises whether these once "sovereign" state lands—unlike the submerged acreage which California did not obtain at statehood—remain in state ownership notwithstanding they are no longer tidelands. That issue is suggested by the hold-

ing of *Corvallis* that the Equal Footing Doctrine irrevocably vests affected acreage, subject only to state law acceptance of the principles of accretion and reliction. In sum, the question is whether the *Corvallis* rule is applicable to tidelands bordering the open sea.

2. We stress, at the outset, that the Court is not committed to the proposition that the Equal Footing Doctrine has any application to tidelands along the open sea. So far as we are aware, this Court has never had occasion squarely to resolve the question.[8] To be sure, the opinion in *United States* v. *California*, *supra*, 332 U.S. at 30, recites with apparent approval the concession of the United States that "under the *Pollard* rule, as explained in later cases, California has a qualified ownership of lands under inland navigable waters such as rivers, harbors, and *even tidelands down to the low water mark*" (emphasis added; footnotes omitted).[9] So, also, the Decree in that case, following our proposal, does not embrace

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[8] The familiar precedents in this Court expressly confirming state title to tidelands have all involved what would today be viewed as *inland* waters, whether in bays (*Pollard's Lessee* v. *Hagan*, *supra*), river mouths (*Shively* v. *Bowlby*, 152 U.S. 1 (1894)), or harbors (*Borax Ltd.* v. *Los Angeles*, 296 U.S. 10 (1935)). The reference to the State as owner of the ocean-front "tideland" in *Hughes* v. *Washington*, *supra*, 389 U.S. at 294 & n.3, is no exception, since, by that time, the Submerged Lands Act had established State title there.

[9] Even that statement is ambiguous: on its face, it could be restricted to tidelands appurtenant to *inland* tidal waters, such as bays, harbors and estuaries, not including the foreshore of the open sea. There is no denying, however, that, at the time, the United States was conceding state ownership of *all* tidelands—witness the decrees proposed and entered in this case and its sequels.

tidelands. 332 U.S. 804-805 (1947). Nor do the like Decrees entered in *United States* v. *Louisiana*, 340 U.S. 899 (1950), and *United States* v. *Texas*, 340 U.S. 900 (1950). But this hardly reflects a firm adjudication of the matter after plenary consideration.

Fortunately, it is no longer necessary to debate the question.[10] For, even if the Court be taken to have ruled that ocean-front tidelands were subject to the *Pollard* rule, it is perfectly clear that, in this context at least, the Equal Footing principle was understood to vest only an *ambulatory* title, shifting as accretion, reliction or erosion defined and redefined the foreshore from time to time. As we have already noted (*supra* pages 11-12), that was then the prevailing view of the *Pollard* doctrine as it applied to all navigable waters. But, in this instance, the opinions and decrees in the first *California*, *Louisiana*, and *Texas* cases, as well as the more recent decisions in the same cases, explicitly implement that understanding.

Indeed, it is obvious that the Court, in confirming the federal claim in submerged lands underlying the Pacific Ocean or the Gulf of Mexico "seaward of the

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[10] There was, of course, less reason to concede state ownership of the foreshore along the open sea. Normally, the banks or shore belong to the owner of the bed: the state in the case of inland navigable waters, the upland proprietor when the water body is not navigable. Thus, under the ruling of the first *California* case that the seabed appertained to the Nation, rather than the states, the adjoining tidelands arguably were likewise within the federal domain—all the more so when the United States was also the upland proprietor. To be sure, the equation changed when Congress relinquished the marginal seabed to the states; it was then entirely consistent to include the foreshore as well.

ordinary low-water mark on the coast" of the respective states (332 U.S. at 805; 340 U.S. at 899, 900), intended an actual reality, not a reconstruction of the historic statehood coastline. Any other reading would be wholly inconsistent with the rationale of the decisions, recognizing the paramount federal interest in the marginal sea as a current geographical fact. Yet, undoubtedly in some places—especially along the fickle Louisiana coast—areas that were once tidelands were now wholly submerged and thus adjudicated to the United States as "seaward of the ordinary low-water mark." So, also, we must assume, former tidelands assimilated to the mainland by accretion would cease to be state lands, although in either case, new tidelands typically would form and inure to the state, whether shoreward or seaward of the historic line.

This equitable and workable regime, as we have seen, was adopted in the Submerged Lands Act which relinquished (or confirmed) to the states title to coastal tidelands, subject to changes in physical geography. 43 U.S.C. 1301(a)(2) and 1311(a). And, since the enactment of that statute, this Court consistently has measured the additional three-mile belt of marginal seabed granted to the States from the current low water line. In these circumstances, it would be wholly inappropriate to apply the *Corvallis* rule retroactively to former tidelands along the open sea.

3. At all events, *Corvallis* is inapplicable here since, ultimately, the issue is the water boundary of uplands which have never left federal ownership. Under *Wilson* v. *Omaha Indian Tribe*, *supra*, that is an issue to be resolved by applying the law of the United States. 442 U.S. at 669-671. States law rules,

it is true, may be "borrowed" in appropriate circumstances. *Id.* at 671-676. But this is plainly not such a case.

Here, the question is not whether to prefer general local property law over a federal "common law" rule devised for the discrete purpose of resolving interstate boundary controveries. With respect to tidelands along the seacoast, Congress has enacted a specific solution which ought to govern uniformly. There are, moreover, adequate reasons for differentiating the law applicable to the edge of the open sea. See *Hughes* v. *Washington, supra*, 389 U.S. at 293.

Nor are there, in our situation, any opposing considerations. Indeed, it can make no sense to defer to a state law rule which freezes the status of former tidelands because the geographical change resulted indirectly from man-made construction, even though the land on both sides remains in the United States. To concede a narrow strip of state lands dividing a federal reservation in these circumstances is a result to be eschewed if at all possible. In our view, this is plainly one of those situations in which there is a "need for a uniform national rule" to protect "federal trust responsibilities," and no countervailing substantial state interest on behalf of other affected landowners. 442 U.S. at 673-674. On the contrary, here there is every reason to subject the former submerged lands and the adjoining former tidelands to the same legal regime. Both must be governed by the federal rule if the tail is not to be permitted to wag the dog.

CONCLUSION

The Motion of the United States should be granted, the Motion of California denied, and judgment entered quieting the title of the United States to the lands described in the Complaint.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

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In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF CALIFORNIA, EX REL.
STATE LANDS COMMISSION, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON CROSS-MOTIONS FOR JUDGMENT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

MICHAEL W. REED
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES

This supplemental brief is submitted pursuant to leave granted by an Order of March 8, 1982. Although reluctant to burden the Court with more paper, we deem it necessary to make a last attempt to narrow, or at least clarify, the issues. Unfortunately, the shifting focus of both parties' submissions to date—not to say outright changes of position [1]—has produced a confection far more

[1] Thus, neither party any longer relies on the largely submerged status of the parcel in suit at statehood as dispositive. For our part, we abandon any suggestion that the accretions which occurred over what was, at the time, federal seabed, are, for that reason alone, federal lands today. On the other hand, we continue to assert the relevance of federal dominion over the formerly submerged area in rebutting California's claim to that acreage as "sovereign State land" since statehood.

difficult to identify than the relatively straightforward Linzer and Sacher tortes mentioned in recent briefs. Viewed as a whole, the disparate arguments now before the Court may rightly be seen as serving up a most unappetizing "pudding without a theme". We have accordingly conscripted our best pastry chefs to concoct what is, we hope, a more palatable dessert.

A. INTRODUCTION

1. At the outset, it is appropriate to stress the historic geographical facts underlying this controversy. Although these have never been in dispute, California's most recent filing might be read as suggesting that the whole of the parcel in suit was, until the jetties had their effect, "tidelands" lying between the high and low water lines. That is not the true situation, as the State's pleadings make clear.

When California submitted its Motion for Leave to File to this Court, the land in dispute was described as an area that had been, at the time the State was admitted to the Union (in 1850), "part of the bed of the Pacific Ocean" (Motion for Leave at 6, 7). Elsewhere in the same filing, there were references to the disputed parcel as formerly "tide and submerged lands" of the State (*id.* at 15, 28). Thus, while the relative proportion of former submerged lands and tidelands was never stated, it appeared that some acreage of each type was involved. Moreover, the Exhibits submitted by California indicated that most of the area was fully submerged until the jetties were constructed at the turn of the last Century, and the State has never challenged our repeated statement to that effect.[2]

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[2] See Memorandum for the United States (Aug. 1981) 1-2; Motion of the United States for Judgment on the Pleadings and Supporting Memorandum (Nov. 1981) 1-2; Brief for the United States (Jan. 1982) (hereafter "U.S. Op. Br.") 2-3; Reply Brief for the United States (Feb. 1982) (hereafter "U.S. Rep. Br.") 4.

2. California now asserts that, "[n]ecessarily, no deposition [of alluvion] could or did take place on submerged lands. All depositions occurred on tidelands owned by California under the Equal-Footing Doctrine" (Cal. Rep. Br. 2; see, also, *id.* 4-7). We are not clear whether this purports to be a proposition of law or a statement of fact. We shall address the legal theory in a moment. But we must immediately question the assertion insofar as the State may be intending to describe a physical process.

It is common ground that the parcel in suit, a major part of which was once wholly submerged, ultimately became upland through sand deposits carried downcoast by wave action, the normal drift further south being deflected by the North Jetty shielding the channel into Humboldt Bay. Presumably, some of the sand was deposited on the then submerged seabed, some on the beach or tidelands area, and some on the edge of the upland coast. Conceivably, the typography was so evenly sloping and the process so regular that every portion of the former seabed passed through a stage of becoming tideland before it ultimately took on the character of upland. But that is far from certain and plainly not demonstrable. For all we know, there were places—most likely along the jetty itself—where upland met submerged land without any intervening tideland and sufficient deposits occurred at one time to transform seabed into upland in one step. Or it may be that sandbars formed seaward of the low water line of the mainland and were later connected to the land mass. At all events, we cannot suppose that the result turns on such unknowable complexities.

3. It is plain that California did not, until its latest filing, rely on any distinction between former submerged lands and former tidelands, or on any claim that State title attached when the seabed assumed the character of tidelands. On the contrary, in its Complaint and supporting argument, California asserted title to the entire

parcel—including then seabed—as vested *at statehood.* See Motion for Leave 5-6, 7, 17-18, 28; Cal. Op. Br. 2-3, 10. Only gradually and grudgingly has the State recognized that this Court long ago expressly denied California's title to submerged lands underlying the open sea, even though within the State's political boundaries. See Cal. Op. Br. 15-16, 27-30; Cal. Rep. Br. 4-7.[3] And so we are confronted with a new proposition: that State title, secure against any rule of federal law, vested in respect of the former seabed *when that area passed through a tideland stage before becoming upland.* The present brief is primarily addressed to that contention—which is advanced as wholly independent of the Submerged Lands Act.

The remainder of our submission responds to two arguments made under the Submerged Lands Act:

(1) That accretions to the mainland caused by natural wave and tidal action deflected by artificial works are "made lands" within the meaning of Section 2(a)(3) of the Submerged Lands Act, 43 U.S.C. 1301(a)(3); and

(2) That such accretions to reserved lands of the United States are not encompassed by Section 5 of the Submerged Lands Act, 43 U.S.C. 1313, because State law does not recognize the added lands as natural accretion inuring to the upland owner.

B. THE TIDELANDS ARGUMENT

We have previously addressed California's claim advanced under the Equal Footing Doctrine insofar as it reaches the relatively small portion of the disputed parcel that constituted tidelands *in 1850,* when the State was admitted to the Union. See U.S. Op. Br. 20-24. That

[3] Even now, it is not entirely clear whether California is asking the Court to overrule the holding of the first *California* case or contending that Congress did so in 1953. At all events, we have no occasion here to repeat our rebuttal to any such arguments. See U.S. Op. Br. 6-20.

submission is equally applicable to tidelands off the open coast formed since statehood but which now lie above the high water line. Indeed, to the extent that California's present argument is a logical extension of the *Corvallis* principle of indefeasable State title, there is all the more reason to hold that principle inapplicable along the open seacoast.

1. As we have earlier noted, the Court has never squarely held that the *Pollard* rule embraces tidelands along an open coast. U.S. Op. Br. 20-22. At all events, we have stressed, tentative acceptance of that proposition has been on the understanding that any State title to ocean-fronting tidelands is ambulatory, vested only so long as the area retains the character of tidelands, as defined by a uniform rule. *Id.* at 22-23. So understood, any State claim to the foreshore of the sea under the Equal Footing Doctrine is moot, in light of the identical grant made by the Submerged Lands Act. *Ibid.* We adhere to that submission, which, if correct, requires rejection of any claim to former tidelands that are today part of the upland mass, regardless whether the area involved was tidelands at statehood or only at some later time.

2. There are, however, independent objections to California's new tidelands argument. One obstacle is that, according to *Corvallis* (assuming arguendo it governs on the open sea), the Equal Footing Doctrine—on which California relies—is fully spent at the moment of the State's admission and grants nothing thereafter. See 429 U.S. at 370-371, 376, 378, 381.

As we have said, we do not believe *Corvallis* is applicable here. But, if it were, its explication of the Equal Footing rule would vest in California only areas that were tidelands in 1850, not subsequently formed tidelands. In this respect, the *Corvallis* principle is even-handed: it allows the states to retain lands encompassed by the constitutional grant effected at statehood regardless of subsequent geographical changes; but it limits the benefit of the Equal Footing Doctrine to lands enjoying

the relevant status on the date of admission. California's submission, on the other hand, is far greedier: the State would invoke the Equal Footing Doctrine as conferring indefeasable title to all qualifying lands at statehood and, also, all acreage that, at any later time, meets the test. In sum, as applied to tidelands, California views the Equal Footing principle as condoning an unlimited appetite to acquire all newly formed tidelands without disgorging any part of what ceases to have that character. Thus far, California has only chosen to retain former tidelands whose physical character has been altered by artificial causes, direct or indirect. But, if it is right, nothing prevents the State from insisting on ignoring the effect of wholly natural changes where that would increase its domain—as the State of Washington has purported to do (see *Hughes* v. *Washington*, 389 U.S. 290 (1967)).

The implications of such a rule are perverse indeed. In order to identify State lands along the coast, it would be necessary to plot the high and low water lines not merely at the date of admission to the Union and at present, but also for all intervening times. And, whenever areas now forming accretions to the upland were once part of the seabed, it would be necessary to determine whether, at some point, they were tidelands. Even in the present case, that is not obvious. But the reconstruction would be all the more difficult when the tide is minimal—as in the Gulf of Mexico or off the North Slope of Alaska—or where the seabed at the coast is not a gentle and regular slope.

California's tidelands rule, moreover, is logically inconsistent. If indefeasable State title vests in all areas that were at any time tidelands, that should hold true whether the zone in question later merges with the mainland by accretion or becomes attached to the seabed because of erosion. Yet, California apparently eschews any claim under *Pollard* to tidelands lost to the ocean by erosion, presumably recognizing that the low water line

along the open coast is ambulatory as a matter of federal law. See Cal. Rep. Br. 2, 5-6. To be sure, the concession is mandated by the first *California* decision of this Court. But it highlights the asymmetry of the argument.

3. By attempting to extend *Corvallis*, California has demonstrated that any general principle of indefeasable title is wholly inappropriate to the open seacoast. The rationale of the first *California* case denying State proprietary rights to the seabed cannot co-exist with a State law rule that retains for the State former tidelands now submerged.[4] And there is no better justification for permitting a State to keep like tidelands when the coastline moves seaward and the area becomes upland. Except for the special case of lands deliberately filled in by official action or permission, the only fair and practical solution is to adhere to the time-honored rule which fixes seacoast boundaries where current geographical reality places them. In sum, *both* the low water line and the high water line are ambulatory, as a matter of constitutional law, which no State can vary—except, of course, by relinquishing some part of its tidelands, so defined. California appears to concede as much with respect to the seaward boundary of coastal tidelands, accepting that the low water line is defined by uniform federal law. It is incomprehensible why the Equal Footing Doctrine—assuming it embraces the seashore at all—should not be understood as likewise fixing the landward boundary of the constitutional grant by reference to a uniform ambulatory high water line principle.

4. What has been said demonstrates, we believe, that insofar as California's claim is predicated on ownership

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[4] What is more, any such application of the *Corvallis* view of indefeasable State title to ocean-fronting tidelands would require reconsideration of all the decisions of this Court recognizing exclusive federal rights beyond three miles from the present coast whenever erosion has moved the statehood low water line more than three miles shoreward or has changed the status of what were once inland waters.

of open coast tidelands under the Equal Footing Doctrine, the State cannot expand the grant by locating the high water line more favorably than the uniform federal rule ordains—whether by choosing a higher water line or denying the effect of accretions that federal law recognizes as pushing out the line. Except for the "made land" provision of the Submerged Lands Act, California explicitly asserts no other basis for its present claim. Yet, there is a suggestion in its most recent submission that, independently of the Equal Footing Doctrine, the State is free to apply its own property law rules in fixing the boundary of riparian lands. See Cal. Rep. Br. 17-20. We turn briefly to that proposition.

Presumably, California is here invoking the second holding of *Corvallis*, that Oregon could claim as State lands, unembarrassed by any rule of federal law, a new riverbed "which did not pass under the equal-footing doctrine." 429 U.S. at 378-382. We are not sure we understand this aspect of the *Corvallis* decision, since it seems to recognize unfettered State power to fashion "real property law" in such a way as to appropriate for the State, without compensation, lands which the Constitution does not vest in the State. No doubt, we read the opinion too broadly.[5] But, it is at least clear that the principle has not been extended to the open seacoast. 429 U.S. at 377 n.6. And, at all events, the Court's subsequent ruling in *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653 (1979), makes it unnecessary to pursue the *Corvallis* ruling here.

Contrary to California's suggestion (Cal. Op. Br. 20), we read *Wilson* as holding that federal law controls the boundaries of lands held by the United States, whether for the benefit of an Indian Tribe or otherwise. 442 U.S. at

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[5] Indeed, the summary of the *Corvallis* holding given in *Wilson*, *supra*, 442 U.S. at 669-670, seems to restrict it substantially. We remain unclear, however, on what basis Oregon could be said to have acquired title to the new bed of the Willamette River in the formerly dry area of the Fischer Cut if the Equal Footing Doctrine did not convey it. See 429 U.S. at 366-367, 378.

670. While, in some circumstances, "borrowing" State property rules may be appropriate, this is plainly not such a case. There are good reasons for following a uniform federal rule even with respect to private lands bordering the ocean. See *Hughes* v. *Washington, supra.* *A fortiori*, self-serving State rules that would detach federal uplands from the sea ought not be accepted. After all, the United States typically retains or acquires coastal lands for a purpose related to their maritime location. And, in any event (as we explore in a moment), the Submerged Lands Act expressly mandates this result.

C. THE "MADE LAND" ARGUMENT

It is hardly debatable, we submit, that, except for "filled in, made or reclaimed lands," the Submerged Lands Act conveys or confirms to the coastal States an ambulatory title to offshore submerged and tide lands, good only so long as they actually fit that description. In the words of the statute, it reaches—with the exception just noted—those areas which "are", at present, "permanently or periodically covered by tidal waters up to but not above the line of mean high tide," "as heretofore or hereafter modified by accretion, erosion, and reliction." 43 U.S.C. 1301(a). We cannot suppose that a casual footnote in the *Corvallis* opinion (429 U.S. at 371-372 n.4)[6] overturns this express statutory limitation. See U.S. Op. Br. 12-15. Nor can it be seriously contended that Congress meant to leave to each beneficiary State the option to apply its own rules of accretion, erosion and reliction, so as to expand the limits of the grant. *Ibid.* For the purposes of the Act, California can no more rewrite the definition of submerged lands or tidelands by embracing artificially caused accretions than Washington can treat *all* offshore accre-

[6] The cited footnote invokes *Bonelli* for the proposition that the Submerged Lands Act merely confirms the *Pollard* rule for inland waters. That observation was, of course, wholly consistent with the view expressed in *Bonelli* that the Equal Footing Doctrine conveyed only an ambulatory title. At all events, the *Corvallis* footnote does not purport to construe the Act as it bears on coastal rights. See 429 U.S. at 377 n.6.

tions as still under water. So far as any State claims under the Submerged Lands Act, it is restricted by the uniform definitions there announced. And, finally, it seems obvious that this federal statute uses the terms "accretion" and "high water line" as they have always been understood in federal law, *i.e.*, as giving the same effect to all gradual changes of the upland boundary, regardless of cause. See U.S. Op. Br. 14-15.[7] Accordingly, it is not surprising that, when it invokes the Submerged Lands Act, California focuses on the one exception to the rule, the "made land" provision.

We have not heretofore argued the point because it seemed self-evident that the accretions at issue do not qualify as "filled in, made, or reclaimed lands," within 43 U.S.C. 1301(a)(3). Even California does not assert that the gradual accretions to the mainland resulting entirely from natural wave and tidal action, albeit deflected by an artificial structure, constitute "filled in" or "reclaimed" lands. And it is a little startling to suggest that the intervening term "made" carries a wholly different meaning. In this context at least, one would most reasonably read "made" as connoting man-made lands, not naturally formed accretion.

To so read the term "made," in accordance with the canon *ejusdem generis*, is not necessarily to condemn it as surplusage. It may have been thought that "filled-in" described only a dumping or pumping in of sand or earth to extend the shore (as was common, for instance, to create or enlarge many recreational beach areas), and that "reclaimed" connoted the draining of shallow areas (as in Florida). Thus, a further word arguably was

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[7] Indeed, Section 1301(a)(3), by its terms, suggests that Congress viewed even wholly artificially filled-in land as "accretion" within subsection (1), and as moving seaward the "high water line," as that term is used in subsection (2). As California itself stresses (Cal. Rep. Br. 2, 5), the Court has expressly held that such artificial additions, labelled "accretions," push out the low water line. *United States* v. *California*, 381 U.S. 139, 176-177 (1965).

required to cover "man-made" harborworks and other artificial structures jutting out to sea. On the other hand, the additional term may simply have been inserted out of abundance of caution, regardless of need. That would not be out of character in a statute so full of redundancies. A sufficient example is Section 3 (43 U.S.C. 1311) where it is "determined and declared" that "title to and ownership of" submerged lands be "recognized, confirmed, established, and vested in" the States or their grantees, and, for good measure, the United States "releases and relinquishes" to them all its "right, title and interest."

We need not resolve the question whether those who included "made lands" in Section 1301(a)(3) were careful or merely cautious. What seems evident on the face of the text is that this insertion was not intended to accomplish a radical change. Any doubt on this score is dispelled when we examine the legislative history of the provision.

2. The story of the Submerged Lands Act is a long one, full of twists and turns, sometimes very difficult to follow. Fortunately, however, the particular provision at issue has a relatively clear pedigree, directly traceable to a single concern that never varied.

Beginning in 1937, the United States began to assert, at first tentatively, a claim to the marginal seabed and its natural resources. See, *e.g.*, S. Rep. No. 133, 83d Cong., 1st Sess. 54-55 (1953). Legislation was sought in 1938 and 1939 to establish a national petroleum reserve of the area and to authorize litigation to vindicate federal title. *Ibid.* Although these measures failed of enactment, the affected States reacted promptly. From the first, concern was expressed that the federal government, in claiming offshore submerged lands, was questioning the title of States and local authorities to formerly submerged areas artificially reclaimed from the sea by land-fill or the erection of coastal structures. This prospect was, of course, disturbing to many States that were otherwise little interested in the marginal sea issue, and therefore created a much larger constituency for legislation quieting

State claims. See, *e.g.*, *Hearings on S.J. Res. 48 and H.J. Res. 225 Before the Senate Comm. on the Judiciary*, 79th Cong., 2d Sess. 58, 67, 69, 74, 75, 206, 212-213, 215 (1946). Accordingly, the initial proposals submitted as early as 1945 included an express provision confirming State title to former submerged and tide lands "which have been filled or reclaimed." *E.g.*, H.R.J. Res. 225, 79th Cong., 1st Sess. (1945).

The same basic formula, justified by the same fears, appears in all subsequent proposed legislation directed to quieting State title to submerged lands. Indeed, the apprehensions were increased when this Court made express reference in its 1947 decision to "improvements [that] have been made along and near the shores at great expense to public and private agencies," some assumed to be "within * * * the boundary of the marginal sea." *United States* v. *California*, *supra*, 332 U.S. at 40. Nor did the Department of Justice successfully allay those fears by proposing legislation that would confirm any existing right to the "*use*" of such artificial structures and the "*surface*" of "filled in or reclaimed land." See, *e.g.*, S. 2222, 80th Cong., 2d Sess., Section 101 (1948). Understandably enough, this partial disclaimer did not satisfy all potentially affected States, since the United States continued to assert title to the underlying land and mineral resources, as this Court later noted. See *United States* v. *California*, *supra*, 381 U.S. at 176. Accordingly, the proponents of State title continued to insist on a provision that would quiet in the State or its grantees former submerged lands now "filled or reclaimed." *E.g.*, S. 1988, 80th Cong., 2d Sess., Section 2(a) (1948).

3. Two critical points must be stressed. First, the purpose of all these provisions—progenitors of Section 1301 (a) (3)—was to confirm the title to "improvements" made *by the State* or under its authority—not *federal* structures or land-fill projects. This alone exempts the disputed parcel, formed by accretion indirectly resulting from

jetties erected by the United States. See Point D, *infra*, pages 16-18.

More important, however, is the exclusive concern of the provisions (as their text makes clear) with extensions to the mainland directly and deliberately created by artificial means. Typically, the States and their subdivisions were worried about the status of areas reclaimed from the sea by drainage and fill (as in Florida) or discrete additions to the coast created by land-fill or artificial structures for harbors or airports or recreational or industrial uses. See, *e.g.*, *Hearings on S.J. Res. 48, etc., Before the Senate Comm. on the Judiciary, supra*, at 58, 67, 69, 74, 75, 206, 212-213, 215; S. Rep. No. 1592, 80th Cong., 2d Sess. 24-25 (1948).

The reason for this narrow focus is simply that there never was any dispute over gradual accretions indirectly attributable to jetties or like structures. Indeed, the United States at all times asserted—even when against its interest—that such additions to fast lands, like wholly natural accretions, inured to the upland owner and ceased to qualify as submerged lands. See, *e.g.*, Brief for the United States Before the Special Master in No. 6, Orig., O.T. 1951, *United States* v. *California* (May 1952), at 161-163. And California agreed that this "Federal rule" should govern, rather than the "exceptional California view." Brief in Relation to Report of Special Master of May 22, 1951, in the same case (July 1951), at 90-92.[8] See, also, Report of the Special Master under Order of December 3, 1951, in the same case (Oct. 1952), at 44. There was accordingly no occasion legislatively to settle the matter: it being accepted on both sides that all gradual accretions had the same effect, whether ultimately attributable to artificial or wholly natural causes, the only difference Congress had to resolve was with respect to

[8] Because of its special eloquence in arguing the appropriateness of following the federal rule in this context, we reproduce as an appendix the relevant pages of this California brief. *Infra*, pages 1a-4a.

wholly artificial State-sponsored extensions of the mainland into formerly submerged or tidal areas.[9]

4. The only remaining question is whether Congress expanded the reach of the provision to cover our case when it added "made lands" to those "filled in" and "reclaimed" in what became Section 1301(a)(3). Every indication is that no such result was intended.

The word "made" was first inserted into the otherwise familiar provision by a bill introduced by Congressman Walter in 1950. H.R. 8137, 81st Cong., 2d Sess., Section 2 (a)(2) (1950). Far from highlighting this addition as significant, the report on that measure describes it as "in substance, the same as" earlier proposals omitting the term. H.R. Rep. No. 2078, 81st Cong., 2d Sess. 3 (1950). At next session, a number of similar bills were introduced, some including "made lands" and some not, without any apparent focus on the difference. Compare H.R. 58, H.R. 1089 and H.R. 1230, with H.R. 415, H.R. 1310, H.R. 1523 and S. 940, all 82d Cong., 1st Sess. (1951). The House Committee took up the new Walter bill (H.R.

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[9] Although Section 1301(a)(3) plainly confirmed title in the State or its grantees to such areas as of the date of the Submerged Lands Act, the United States continued (erroneously) to challenge the State's claim to subsequent artificial extensions or at least to treating them as part of the baseline from which the 3-mile grant of submerged land should be measured. That is the point decided in California's favor by this Court in 1965. See 381 U.S. at 176-177. But, contrary to the State's present submission, that ruling did not remotely speak to the issue now before the Court. First, although the Opinion refers to "artificial accretions," the only areas in dispute comprised filled-in land or harbor works. Moreover, as the passage makes clear, the Court was addressing only situations in which "*a State* extends its land domain by pushing back the sea" (*id.* at 177, emphasis added), not *federal* improvements, or accretions to reserved lands of the United States, as here. And, finally, the only issue actually before the Court was not ownership of the mainland extensions, but, rather, whether these affected the "low water line" from which California's Submerged Lands Act grant should be measured.

4484, 82d Cong., 1st Sess. (1951)), identical to H.R. 8137 of the previous session and therefore containing the word "made." After amending it in other respects, the Committee reported it favorably, again without treating the insertion of "made lands" as worthy of comment. See H.R. Rep. No. 695, 82d Cong., 1st Sess. 4, 19 (1951). Thereafter, in the Senate, Senator Holland "literally lifted" the relevant provisions of the Walter Bill as a substitute for his own measure (S. 940, 82d Cong., 1st Sess. (1951), which had not included the term "made." See 98 Cong. Rec. 3349 (1952). But neither the sponsor, nor anyone else, commented on the "made land" addition. Indeed, immediately after this action, Senators continued to speak of the importance of confirming State title to "built lands," "filled lands," "filled in lands," and "reclaimed lands," without using the term "made" or suggesting any wider category of added lands that required attention. *E.g.*, 98 Cong. Rec. 3351, 3358, 3366 (1952). Shortly thereafter, this Holland Bill (redesignated S.J. Res. 20, as amended, 82d Cong., 2d Sess. (1952))—with "made lands" included—passed both Houses, and was vetoed by President Truman in 1952. See S. Rep. No. 133, *supra*, at 23. Henceforth, the comparable proposals included the word "made." *E.g.*, S.J. Res. 13, 83d Cong., 1st Sess. (1953); S. 294, 83d Cong., 1st Sess. (1953). And, of course, the measure enacted in 1953 referred to "made lands."

Thus, the words now invoked were before Congress for more than two years. Yet, so far as we have been able to determine, no Member of either House at any time ever suggested that this language effected any substantive change. Nor did the United States ever alter its position that accretions of the kind now in question, as a matter of governing federal law, inured to the upland proprietor and ceased to qualify as submerged lands.

Against this background, it would be wholly extravagant to give significance to the occasional casual remark of a witness or legislator describing naturally formed ac-

cretion as "made."[10] See Cal. Rep. Br. at 9. So far as has been discovered, no Member of either House suggested that Section 1301(a)(3) reached such accretion, even if ultimately attributable to artificial works. See 42 Op. Att'y Gen. 241, 250 (1963). Congress simply was not addressing the question of title to areas no longer washed by the sea, except only for deliberate man-made extensions encroaching on the former seabed—the only "upland" areas ever in controversy.

In sum, California cannot rely on the Submerged Lands Act as granting or confirming its claim to the parcel in suit. On the contrary, as we now demonstrate, the Act expressly rejects such an assertion where the United States is the upland owner.

D. THE SECTION 5 ARGUMENT

California makes a two-fold response to our suggestion that Section 5 of the Submerged Lands Act (43 U.S.C. 1313) confirms federal title to the area in dispute. See Cal. Rep. Br. 13-15.

1. The State's first point is that the land in suit was not "filled in, built up, or otherwise reclaimed by the United States for its own use." *Id.* at 13-14. We agree. However, we do assert that the words "filled in, built up, or otherwise reclaimed," as used here, were intended to cover the same ground as "filled in, made, or reclaimed lands" in Section 1301(a)(3). Thus, if (contrary to our primary submission) our parcel is included by the latter provision, it is excluded by the former. This is, indeed, how the Attorney General explained this new clause of Section 5 which his Department had drafted. See *Hear-*

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[10] California cites the testimony of Commissioner Moses of New York and Senator Daniel's later comments on his testimony. Cal. Rep. Br. 9. In fact, Mr. Moses was almost exclusively speaking of deliberately filled shore land. See *Hearings on S.J. Res. 13, S. 294, S. 107, S. 107 Amendment and S.J. Res. 18 Before the Senate Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess. 137-162 (1953). And the Senator acknowledged that the United States was only claiming "artificially filled land." *Id.* at 193.

ings on S.J. Res. 13, etc., Before the Senate Comm. on Interior and Insular Affairs, supra n.10, at 935. In his words (*id.* at 926) the combined effect of Section 1301(a)(3) and Section 1313(a) was:

> to make certain that all installations by the States on submerged, reclaimed, or filled or other lands inside the line, belong to the States subject to the navigation servitude; also that all installations and acquisitions of the Federal Government within such area belong to it.

2. More significantly, California addresses our assertion that Section 5 of the Act expressly confirms to the United States "accretions" to retained federal coastal upland. See U.S. Op. Br. 16-17; U.S. Rep. Br. 3. The State's answer here is that only such accretions as *State* law recognizes are covered. Cal. Rep. Br. 14-15. Why such a principle should obtain is not remotely suggested. Nor can we appreciate what would motivate a Congress intent on protecting the federal interest in maintaining its coastal installations, and presumably their access to the sea, to subject such areas to a State law rule that might deny these lands their riparian value. There is, on the contrary, every reason here to read "accretions" as referring to additions so treated by federal law.

No different indication is given in the discrete provisions of Section 5 and Section 3 (43 U.S.C. 1311(a)) mentioning "State law." In the first instance, the Act exempts "all lands which the United States holds under the law of the State." 43 U.S.C. 1313(a). But that is obviously not a qualification of the other categories of exempted lands. Suffice it to ask whether the effectiveness of federal title to lands acquired by the United States from a private landowner "by eminent domain proceedings" depends upon State law?

Equally irrelevant is the cited provision of Section 3, which confirms title in "the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located."

43 U.S.C. 1311(a). That Congress quite naturally deferred to State law as to the *proper beneficiary* of the grant is hardly evidence that State law was intended to control the *scope* of the grant itself.

If these exceptional references to State law show anything, it is that Congress knew how to make clear when the uniform federal rule would not apply. The normal principle, as one would expect in a federal statute of nationwide application which sought to treat all States on an "equal footing," is that the terms used are to have the same meaning everywhere and, unless otherwise indicated, the settled meaning known to the law of the United States. Nor would this be an unusual or unfamiliar doctrine so far as "accretion" was concerned. As California was at pains to point out to this Court in 1952, the so-called "Federal rule"—treating alike all gradual accretion, irrespective of cause—was the standard, imported from English common law, repeatedly declared by this Court, and followed in the great majority of States. See California's Brief in Relation to Report of Special Master of May 22, 1951, *supra*, at 90-91 (Appendix, *infra*, 2a-3a). We may safely assume everyone understood that the Submerged Lands Act was confirming federal title to all accretion attached to uplands reserved by the United States, whether or not the natural forces that produced it had been deflected by artificial structures.

E. CONCLUSION

At issue is an area of fast lands fronting on the Pacific Ocean, all above the high water line, which long ago became attached to a coastal federal enclave, expressly set aside for more than a century as a Coast Guard Reservation. It would be an extraordinary rule that detached this parcel as State land and deprived the United States of its access to the sea, especially when no action or expenditure by the State had any part in creating the new land and the State has suffered no net loss of territory if the accretions are conceded to the United States. The law, to be sure, does not always do equity or

follow common sense. But, at some point, the law rebels at being made to look the fool. This is such a case.

In responding to California's ingenious fictions, our objective has been to rescue the Equal Footing Doctrine and the Submerged Lands Act from absurdity. At the end of the day, our submission is that both the Constitution and the Act of Congress announce a clear, workable and equitable rule, consistent with the wisdom of the common law and the law of nations. It is this: that, except in very special circumstances where the seabed has been artificially built up by improvements made by the State or under its authority, legal boundaries along the open coast follow geographic reality, regardless of cause. We may doubt whether California is free to alter this simple principle to its advantage in defining the littoral rights of its own citizens. Arguably, that is not our affair. We are clear, however, that the State may not invoke the Equal Footing Doctrine or the Submerged Lands Act to this end, and that no other constitutional principle condones any expansion of the rule to deprive the United States of benefits appertaining to the national sovereign.

For the reasons stated here and in prior briefs, judgment should be entered quieting the title of the United States to the parcel in suit.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

MICHAEL W. REED
Attorney

MARCH 1982

APPENDIX

(from a Brief filed by the State of California, dated July 31, 1951)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 6, Original

UNITED STATES OF AMERICA, PLAINTIFF

v.

THE STATE OF CALIFORNIA

BRIEF IN RELATION TO REPORT OF SPECIAL MASTER OF MAY 22, 1951

EDMUND G. BROWN,
Attorney General of the State of California

EVERETT W. MATTOON,
Assistant Attorney General
600 State Building,
Los Angeles 12,
Counsel for California.

B. Even Assuming Solely for the Purposes of Argument That 1850 Conditions Must Be Considered in Determining the Boundaries of the Marginal Belt, Accretions on the California Shore Line Formed by Slow and Imperceptible Degrees but Caused by Man-Made Structures Should Not Be Included in the Marginal Sea.

The second preliminary question is raised by Plaintiff's assertion that the Court must decide "whether the California rule that accretions artificially induced do not accrue to the adjoining landowner or the Federal rule that such accretions do accrue to the owner of adjoining land is to be applied." (Master's Report, p. 30) As shown above, it is the position of California that the marginal sea does not include any of the shore-line area which is not presently submerged and that the boundaries of the marginal sea must be determined on the basis of present conditions in the shore-line area. Consequently, California believes that there is no occasion for choosing between the Federal and California rules on accretions.

Assuming, however, solely for the purposes of argument that the marginal sea does extend to land which is not presently submerged, California believes that the Court should adopt the federal rule that accretions formed by gradual and imperceptible degrees even though induced by artificial structures accrue to the owner of the adjoining land.

The basis of the federal rule is the common law principle that natural accretions belong to the riparian or upland owner, while artificial accretions do not. Under the federal rule, accretions formed by slow and imperceptible degrees are held to be natural and not artificial even though the impelling cause is the erection of some artificial structure or some other work of man. *County of St. Clair* v. *Lovingston*, 23 Wall. 46, 66-69. The federal view that such accretions are natural and not artificial reflects the English common law rule to that effect. *Brighton and*

Hove Gen- [91] *eral Gas Co.* v. *Hove Bungalows Ltd.* (1924), 1 Ch. 372, 381, 383-390, *Doe* v. *East India Company* (1856), 10 Moore P.C.C. 140, 14 Eng. Reprint 445. States other than California have generally taken the same view as the federal courts. See e.g., *Burke* v. *Commonwealth* (Mass. 1933), 186 N.E. 277, 279; *Hanson* v. *Thorton* (Ore. 1919), 179 Pac. 494, 496; *Tatum* v. *City of St. Louis* (Mo. 1894), 28 S.W. 1002, 1003.

California courts have carved out a narrow exception to this view of the federal courts, the English common law, and the majority of American state courts. In the special circumstances where there is a controversy between an upland owner and the State of California or its grantee, it is held that accretions formed by gradual and imperceptible degrees but indirectly caused by a man-made structure are "artificial" and hence do not belong to the upland or riparian owner. *Carpenter* v. *City of Santa Monica*, 63 Cal. App. 2d. 722 (1944).

There are ample reasons why this exceptional California view should not be extended and applied in determining the boundaries of the marginal sea off California. As pointed out above, the California rule is contrary to that adopted by the courts of most other states. Consequently, if state law is to be applied in determining the boundaries of the marginal sea, there would be a different result in different states. In view of the international importance of a nation's policy with regard to the width of this belt, it would seem especially undesirable for the United States not to have a consistent policy concerning its boundaries. Since the limits of the marginal sea are a national problem arising all along this country's ocean boundary, the application of the uniform federal rule would seem preferable.

Moreover, the considerations in this proceeding between California and the United States concerning the limits of the marginal sea are substantially different from those involved in the controversy between the State and an upland owner in the case where the exceptional Cali-

fornia rule was [92] enunciated. The California rule was adopted to enable municipalities to improve their harbor areas without having to condemn the accreted areas and to protect the interest of California citizens in the tidelands (held in trust for them by the State). *Carpenter* v. *City of Santa Monica*, 63 C. A. 2d at 794. Application of the California exception in the present proceedings would not serve the purposes for which it was created. Here, the California rule would be destructive, rather than protective, of the interests of California citizens and municipalities in the tidelands. Consequently, it would seem improper to apply in this proceeding the California rule which was devised for application in substantially different circumstances.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 89, Original

STATE OF CALIFORNIA, EX REL.,
STATE LANDS COMMISSION, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON CROSS-MOTIONS FOR JUDGMENT

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Pursuant to Rules 9.5 and 9.6 of the Rules of this Court, the Solicitor General, on behalf of the United States, moves for leave to file a supplemental brief before argument.

In accordance with Orders entered November 30 and December 7, 1981, this case is before the Court on cross-motions for judgment. The same Orders provided for simultaneous opening and reply briefs by the parties, which have been filed. The Reply Brief of California raises new or substantially new arguments which, because of the simultaneous briefing schedule, the United States has not had an opportunity to answer. In the interest of orderly presentation of the case, it seems desirable that a written response to those arguments now be submitted by the United States. This would permit the Court to focus on the critical issues, as more narrowly defined, before oral argument.

Specifically, we seek leave to reply to the following contentions of the State of California, raised or elaborated in its Reply Brief:

(1) That, independently of the Submerged Lands Act (43 U.S.C. 1301 et seq.), lands wholly submerged beneath the open sea when California entered the Union, which became uplands before 1953, are sovereign lands of the State in accordance with State law property rules, because at some intervening time the lands were tidelands;

(2) That accretions to the mainland caused by natural wave and tidal action deflected by artificial works are "made lands" within the meaning of Section 2(a)(3) of the Submerged Lands Act, 43 U.S.C. 1301(a)(3);

(3) That such accretions to reserved lands of the United States are not encompassed by Section 5 of the Submerged Lands Act, 43 U.S.C. 1313, because State law does not recognize the added lands as natural accretion inuring to the upland water.

If leave is granted, the United States would undertake to file its supplemental brief on or before March 15, 1981, and would limit that submission to twenty printed pages.

Counsel for the State of California has authorized us to state that he has no objection to the granting of this motion.

Respectfully submitted.

REX E. LEE
Solicitor General

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No. 89, Original

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

STATE OF CALIFORNIA, ex rel.
STATE LANDS COMMISSION,
Plaintiff,

VS.

UNITED STATES OF AMERICA,
Defendant.

On Bill of Complaint

Reply Brief of Plaintiff, State of California, ex rel. State Lands Commission

GEORGE DEUKMEJIAN
Attorney General of the State of California
N. GREGORY TAYLOR
Assistant Attorney General
DENNIS M. EAGAN
BRUCE S. FLUSHMAN
(Counsel of Record)
Deputy Attorneys General
6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-1152
Attorneys for Plaintiff

BOWNE-PERNAU WALSH • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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No. 89, Original

In the Supreme Court

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OCTOBER TERM, 1981

STATE OF CALIFORNIA, ex rel.
STATE LANDS COMMISSION,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

On Bill of Complaint

Reply Brief of Plaintiff, State of California, ex rel. State Lands Commission

INTRODUCTION AND SUMMARY OF ARGUMENT

This is a case about federalism. The issue is what law—State or federal—governs the location of the boundary between federal upland and tidelands to which California gained title under the Equal-Footing Doctrine upon its admission to the Union. Even the United States concedes that, after statehood, this issue is governed by state law when the boundary between federal upland and state tidelands in "inland waters" is concerned. Brief for the United States (Jan. 1982) ("U.S. Br.") at 15. The concession is dispositive of this case, for no different rule applies to such boundary questions along the open coast. Indeed, the United States agrees that, under California law, California has title to the subject land, which was filled in and covered up as the direct result of the United States' jetty installation over forty years after California's admission to the Union.[1]

Seeking to avoid the effect of these concessions, the United States spends the great bulk of its brief constructing a brittle diversionary argument. Basically, the United States asserts that the deposition caused by its jetty construction occurred on federally-"owned" submerged lands, whose landward boundary, the ordinary low-water mark, was fixed in location by such activity. U.S. Br. at 5, 6, 11, 20. As a result the United States contends that the deposition caused by the United States filled in and elevated the submerged lands above the Pacific Ocean. With respect

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[1]The subject land remained barren, unused and unoccupied for the next eighty years until the United States, in late 1977, sought California's permission to construct a watchtower. California's Opening Brief, etc. (Jan. 1982) ("Cal. Br.") at 5-6.

to the "small strip of tideland," the United States argues, in contrast, that the high-water boundary moves and that "accretions" inuring to federal upland filled in and covered up these tidelands. Id. at 6, 11, 20, 23-24. By this pincers movement, the argument concludes, federal upland ownership met federal submerged lands "ownership" and wiped out any vestige of California's tidelands ownership. This argument is without merit.

First, the United States ignores the plain holding of *United States v. California,* 381 U.S. 139, 176-177 (1965), that the landward boundary of submerged lands, the low-water mark, moves according to changing physical reality, no matter the cause of the change. Here, at the same time the jetty-caused deposition occurred along the high-water line, a continuous seaward movement of the low-water mark also resulted. Necessarily, no deposition could or did take place on submerged lands. All depositions occurred on tidelands owned by California under the Equal-Footing Doctrine and waterward of the high-water mark that had been, under California law, fixed in location by jetty construction. Second, the argument is internally inconsistent. The United States asserts that the same deposition that filled its submerged lands at the same time also attached to and became part of its upland by "accretion." U.S. Br. at 6, 11, 20, 23-24. Even the Solicitor General has recognized that, with true "accretion", there is only one effect of this deposition process: the deposition expands the upland parcel rather than raising "submerged lands" above water. 42 Op.Att'yGen. 241, 261 (1963). Thus, if the United

States claims by virtue of "accretion" it cannot also claim that its "submerged lands" were elevated above the water by the same process. Third, as an independent argument, the Submerged Lands Act confirmed California's title to the subject land as "made" land. Finally, adoption of the United States' argument would unsettle countless shoreline titles and create land management chaos. This unnecessary consequence should be avoided.

Compounding the misconceptions in its lead argument, the United States makes an even more startling contention when it asserts, contrary to the decisions of this Court, that there is a "federal constitutional rule" of shoreline changes that governs changes in the high-water boundary of California's tidelands. U.S. Br. at 11, 22. The United States alleges that this "rule" was confirmed in 1953 by the Submerged Lands Act, which was enacted before *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977) (*"Corvallis"*), "changed" the "rule" some 25 years later and held that state, not federal, law governed post-statehood boundary disputes. U.S. Br. at 11, 22. No authority is cited for this contention. There is none; post-statehood boundaries of state sovereign lands are and have been determined pursuant to state law.

This brief will first reaffirm the source of California's title to the lands upon which the deposition occurred. In so doing, California will dispose of the United States' "submerged lands" argument. Second, California's alternate source of title under the Submerged Lands Act will be discussed. Finally, the abbreviated arguments of the United States concerning the choice-of-law issue will be addressed.

I

THE DEPOSITION CAUSED BY THE UNITED STATES OCCURRED ON TIDELANDS OWNED BY CALIFORNIA PURSUANT TO THE EQUAL-FOOTING DOCTRINE; IT DID NOT AND COULD NOT OCCUR ON SUBMERGED LANDS.

A. California Received Sovereign Title To Its Tidelands By Virtue Of The Equal-Footing Doctrine.

For at least one hundred and forty years, it has been recognized that the States received title to tidelands under the Equal-Footing Doctrine. E.g., *Martin v. Waddell,* 41 U.S. (16 Pet.) 367, 410 (1842); *Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212, 229 (1844); *United States v. California* (Supplemental Decree) 382 U.S. 448, 452-453 (1966); *Corvallis,* 429 U.S. at 370-374.

Even in connection with the 1947 California decision both the Supreme Court and the United States recognized California's undisputed title to its tidelands. *United States v. California,* 332 U.S. 19, 22, 30 (1947). And although the ownership of tidelands by the States was not contested, the State's title to tidelands was "confirmed" in the Submerged Lands Act. 43 U.S.C. §§ 1301(a), 1311.[2]

[2]The legislative history makes clear that insofar as tidelands were concerned the Submerged Lands Act was merely an affirmation of already vested State title. E.g., H.R.Rep. No. 2078, 81st Cong., 2nd Sess. 52, 54 (1950); H.R.Rep. No. 215, 83d Cong., 1st Sess. 104 (1953) (veto message of President Truman, S. Doc. No. 139, 82d Cong., 2d Sess. 2 (1952), reprinted in 1952 U.S. Code Cong. & Admin. News 908); S. Rep. No. 133, 83d Cong., 1st Sess. (minority views) 10, 15-18, reprinted in 1953 U.S. Code Cong. & Admin. News 1543, 1549-1551; 99 Cong. Rec. 2862-2863 (1953) (remarks of Senator Douglas); *Corvallis,* 429 U.S. at 371, n. 4. And the Submerged Lands Act did not alter state property law concerning shoreline ownership. *Corvallis,* 429 U.S. at 371, n. 4.

It is the boundaries of these tidelands that are disputed by the United States. The landward boundary of tidelands is the ordinary high-water mark. *Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 22, 26 (1935). The seaward boundary of tidelands is the ordinary low-water mark. *United States v. California*, 332 U.S. at 30; *United States v. California*, (Decree) 332 U.S. 804, 805 (1947). Importantly, the location of the ordinary low-water mark has already been settled by this Court.

B. Along the Open Coast the Seaward Boundary of California's Tidelands and the Landward Boundary of the Submerged Lands, the Ordinary Low-Water Mark, Follows Physical Changes Irrespective of Cause; Thus, No Deposition Could Occur on Submerged Lands.

The United States' argument that the low-water boundary between tidelands and submerged lands was fixed and the deposition occurred on submerged lands is contrary to the plain holding of *United States v. California*, 381 U.S. 139. In that case the Court defined the low-water mark as the lower low-water line as it actually existed, no matter how it came to be there, whether by natural or artificial causes. *Id.* at 175-177. The Court determined that this line followed physical realities regardless of what process, either natural or artificial, caused movement of the lower low-water line. Ibid.; *United States v. California* (Supplemental Decree), 382 U.S. at 449.

Thus, the seaward boundary of California's tidelands along the open coast (which is also the landward boundary of submerged lands) is the actual line of low-water, regardless of how that line changed over time, whether by natural causes or by the works of man. In this case, begin-

ning in 1891 with the construction of the jetties, that low-water line was continually and progressively pushed farther and farther seaward as the artificial depositions also pushed out the high-water line. The depositions started along the high-water line and continued to be made along this line over the years as its physical, geographical location moved seaward. At no point in time could the deposition caused by the jetty form on the submerged lands, which always lay seaward of the artificially changing low-water line. *Ibid.* Indeed, such depositions occurred entirely on State tidelands.

C. All Depositions Occurred Landward of the Submerged Lands on California's Tidelands, Whose High-Water Boundary Was, Under Settled California Law, Fixed In Location By Jetty Construction.

Although the low-water boundary of tidelands always remains ambulatory, the same is not always true of the high-water line. Post-statehood changes in that line are subject to the laws of the State. *Corvallis*, 429 U.S. at 376. This is true even though the original boundary is defined by federal law. *Ibid.; Borax*, 296 U.S. at 22, 26. ". . . [T]hat determination is solely for the purpose of fixing the boundaries of the [tidelands] acquired by the State at the time of its admission to the Union; thereafter the role of the equal-footing doctrine is ended and the land is subject to the laws of the State." *Corvallis*, 429 U.S. at 376; *accord, Pollard*, 44 U.S. (3 How.) at 229-230; *Joy v. St. Louis*, 201 U.S. 332, 340, 343 (1906); *Arkansas v. Tennessee*, 246 U.S. 158, 175-176 (1918); *Montana v. United States*, 450 U.S. 544, 551 (1981).

California law holds that deposition artificially caused by works of man, such as the jetties built by the United States here, is owned by the State and not the upland owner to whose property such deposition physically attached. *Carpenter v. City of Santa Monica,* 63 Cal.App.2d 772, 794, 147 P.2d 964, 975 (1944); *People v. Hecker,* 179 Cal.App.2d 823, 837, 4 Cal.Rptr. 334, 343 (1960). The effect of this rule is to fix in geographic location the high-water boundary of tidelands at the time the artificial influence was first introduced. This rule is similar to the rule concerning avulsion, which results in the fixing of the boundary of the watercourse at a former location. E.g., *St. Louis v. Rutz,* 138 U.S. 226, 245 (1891). Thus, in this case, the United States' jetty construction fixed in location the high-water boundary between federal upland and the tidelands of California.

Consequently, the deposition caused by the jetty formed on California's tidelands. No deposition occurred on the "submerged lands" because, as discussed above, the landward boundary of submerged lands was pushed farther and farther seaward as the depositions pushed the low-water mark seaward. Under settled California law, conceded by the United States, such artificial deposition is owned by California as part of its tidelands.

Thus, California's title to the subject land is derived from the Equal-Footing Doctrine and can stand solely on that basis, without reliance on the Submerged Lands Act.

II

CALIFORNIA'S TITLE TO THE SUBJECT LAND HAS BEEN CONFIRMED AND RATIFIED BY THE SUBMERGED LANDS ACT.

Quite independently of the Equal-Footing Doctrine and contrary to the position of the United States, the Submerged Lands Act provides California an alternate source of title to the subject land.

A. The Subject Land is "Made" Land Confirmed In California by the Submerged Lands Act.

The lands confirmed or ratified in State ownership in 1953 by the Submerged Lands Act were not limited to lands then covered by navigable waters. "Lands beneath navigable waters," were expressly defined to include lands that had been "filled in, made or reclaimed." 43 U.S.C. § 1301(a)(3). The Submerged Lands Act confirmed and ratified California's title to such "made" land. 43 U.S.C. § 1311.

The subject land is "made" land. Although the United States quibbles that the deposition occurred as a result of "natural wave and tidal action," "albeit 'fairly' rapid," U.S. Br. at 3, the United States has conceded that the deposition process which created the subject land was the direct result of jetty construction that disturbed the pre-existing natural shoreline regime. Id. at 3, 6, 15, 24.[3] The Submerged

[3]Significantly, the United States admitted in its permit application: "The watch tower site is located on an area of accreted land formed subsequent to the initial construction of the North Jetty in 1889 . . . This new land was formed as result of the North Jetty acting as a barrier to downcoast littoral sand movement . . ." Supporting Exhibits, Exhibit E, "Environmental Assessment, etc.,"

Lands Act confirmed and ratified title in the States to this very type of land.

In testimony in support of S.J. Res. 13, 83d Cong., 1st Sess., which was ultimately enacted as the Submerged Lands Act, Robert Moses, the famed New York planner, described the need to confirm the State's title in the exact situation in this case. Moses referred to lands that had grown up as the result of jetty construction as "filled in artificially or by the action of the tide . . ." And Senator Daniel termed such land as "made" land, title to which should be confirmed by Congress. Hearings Before the Sen. Comm. on Int. and Insular Affairs on S.J. Res. 13, etc., 83d Cong., 1st Sess. 158, 193-194 (1953) (remarks of Mr. Moses and Sen. Daniel).

The "made" lands provision was meant to do equity by applying ". . . to areas that are now above water, but which were under navigable waters at some time in past." 99 Cong. Rec. 2633 (1953) (remarks of Sen. Cordon.). There was no indication that Congress meant to distinguish between lands that were intentionally "made" and lands that were not deliberately "made" but were "made" as the direct result of man's works.[4] Indeed, both supporters and oppo-

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at 2 ("Environmental Assessment"). The process described by the United States in its application and brief comports exactly with the process described by California cases which hold that such artificially made lands are owned by the State. *Carpenter*, 63 Cal.App. 2d at 777, 147 P.2d at 966.

[4]As early as 1949, then Solicitor General Perlman represented the consistent view of the United States that equities which had risen based on construction of artificial structures along the open coast and the rights of the States and individuals in connection with such works should be confirmed. Submerged Lands:

nents[5] of the legislation agreed that tidelands that became filled in over time belonged to the States. *Ibid*; 99 Cong. Rec. 2968-2972 (remarks of Sens. Lehman and Holland), 3000-3003 (remarks of Sen. Douglas); 42 Op.Att'yGen. at 247-250. A reading of this history can only lead one to conclude that Congress, in enacting this section, did not intend to interfere with public and private rights or equities that had grown up over the years in these "made" lands. "Congress was not in a niggardly mood, holding out every bit of land that it could find an excuse to retain." 42 Op.Att'yGen. at 254. As recognized in *United States v. California*, 381 U.S. at 176-177, Congress confirmed California's title to land such as the subject land as "made" land.

B. The Relation Back Principle Independently Supports the Conclusion that the Subject Land Was Confirmed In California As "Made" Land by the Submerged Lands Act.

Putting aside the particular legislative history concerning the "made" lands provision of the Submerged Lands Act, the purpose of Congress in enacting the Submerged Lands Act supports the conclusion that it confirmed Cali-

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Hearings Before the Sen. Comm. on Int. and Insular Affairs on S.155, etc., 81st Cong., 1st Sess. 25, 485 (1949) (statement of Solicitor General Philip B. Perlman).

[5]The opponents of the Submerged Lands Act in the Eighty-Third Congress introduced a competing bill, S. 107, 83d Cong., 1st Sess., which, as one of its provisions, also confirmed State title to filled in, made, or reclaimed land. Its sponsor conceded that if S.J.Res. 13 passed there was no need for S. 107. Hearings in Executive Session, Sen. Comm. on Int. and Insular Affairs on S.J. Res. 13, etc., 83d Cong., 1st Sess. 1333 (1953) (remarks of Sen. Anderson).

fornia's title to the subject land as "made" land. The whole purpose of the Submerged Lands Act was to ". . . undo the effect of [the 1947 California decision] and to 'restore' to the States . . . 'what they supposed that they already owned.'" prior to that decision. 42 Op.Att'yGen. at 253; *accord, United States v. Louisiana,* 363 U.S. 1, 28 (1960); *United States v. California,* 436 U.S. 32, 37 (1978).

Under long-settled California law and according to California cases decided both prior to 1947 as well as after 1953, artificial addition to the shoreline, such as the deposition formed as the direct result of the jetty construction by the United States, does not inure to the upland owner. *Carpenter,* 63 Cal.App.2d at 794, 147 P.2d at 975; *Hecker,* 179 Cal.App.2d at 837, 4 Cal.Rptr. at 343. The artificially-created land remained tidelands in State ownership. *Ibid.* As the intent of Congress was to recognize the public and private expectancies concerning tidelands ownership that had arisen prior to 1947 and to put the States back where they were prior to 1947, that is, to confirm title in line with state law as it existed prior to the 1947 California decision, ". . . the title so conferred [by the Submerged Lands Act] related back so as to confirm and maintain possession and title of the state as good from the beginning." *Hecker,* 179 Cal.App.2d at 836, 4 Cal.Rptr. at 342-343; *accord, Superior Oil Company v. Fontenot,* 213 F.2d 565, 569 (5th Cir. 1954), cert. den., 348 U.S. 837 (1954); Cal.Br. at 18-19, n. 18. Indeed, 43 U.S.C. section 1311(a) provides that title to land beneath navigable waters (including "made" land) is confirmed to the States and those persons *entitled thereto under state law.*

To hold otherwise would create title uncertainties regarding countless acres of California shoreline. A particular example is the shore of Santa Monica Bay, formed by artificial deposition and held by California law to be State owned. *Carpenter,* 63 Cal.App.2d at 776-779, 794, 147 P.2d at 966-967, 975. Further, the resulting Sacher torte[6] scheme of multi-layered ownerships, Cal. Br. at 30-31, would create a land management nightmare.[7]

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[6]California's appetite for metaphor exceeded its gastronomic knowledge. With apologies to Court and counsel, the torte referred to in Plaintiff's Opening Brief at 31 should be a Sacher torte, not a Linzer torte.

[7]The United States argues that should California prevail, the Court would be burdened with endless and intractable litigation; indeed the Court would have to "redraw the Louisiana coast." U.S. Br. at 19. This argument is a "red herring." With respect to the "Louisiana coast" argument, the United States mixes apples and oranges by equating boundary determinations concerning the "coastline" under the Submerged Lands Act with determinations concerning the landward boundary between tidelands and upland. The principles for determining the "coastline" from which the three-mile boundary between State and Federal submerged lands is calculated have been established, e.g., *United States v. California,* 381 U.S. 139, and will not be affected by this case. Thus, neither the California nor, for that matter, the Louisiana coastline will have to be redrawn as the *"coastline" is not concerned in this case.* What is concerned is the landward boundary of tidelands, the high-water mark. With respect to boundary disputes over the location of the high-water mark, the majority of such cases do not affect the United States, as they have arisen and will arise between private persons and the State in state courts, which courts have applied and will continue to apply settled state law to resolve the issues. Indeed, it is the United States' argument that would cause endless and intractable litigation, as it would unsettle established state law regarding upland boundaries. And rather than arising in state courts, such boundary litigation would occur in federal courts, *infra,* p. 20, adding yet additional litigation to their already crowded calendars.

The relation back principle applies here. Resorted to when justice requires, *United States v. Detroit Lumber Company,* 200 U.S. 321, 334 (1906), the relation back principle also honors the Congressional purpose of putting the States back where they thought they were prior to the 1947 California decision. The subject land has always been thought, under California law, to be State-owned. Congress confirmed and ratified that belief in Submerged Lands Act. 43 U.S.C. §§ 1301(a)(3), 1311.

C. The Exceptions to the Submerged Lands Act Do Not Encompass The Circumstances of This Case.

With support neither in fact, the words of the statute, nor the intent of the Submerged Lands Act, the United States appears to be arguing that the subject land is excepted from the Submerged Lands Act by 43 U.S.C. section 1313(a) ("Section 1313"). U.S. Br. at 16-17. Close examination of this contention exposes its lack of substance.

Because the subject land is barren and unoccupied, Supporting Exhibits, Exhibit E, "Environmental Assessment," at 2-3, and because the United States came to California for permission to use the subject land, *id.,* Exhibit E, it is difficult to take seriously the United States' claim, under section 1313, that this land was "filled in, built up or otherwise reclaimed by the United States for its own use . . ." U.S. Br. at 16. In its brief, the United States pointedly states that the land was not created "by an artificial land fill, drainage or other deliberate human activity" but by "natural wave and tidal action." *Id.* at 3. These are unequivocal admissions that the United States did not fill in, build up or otherwise reclaim these lands for its own

use and that this clause of section 1313 does not cover the subject land.

Additionally, the United States contends that the subject land was formed as "accretion" to upland ceded to or retained by the United States and was therefore excepted by another clause of section 1313 from the Submerged Lands Act. U.S. Br. at 16. This argument is supported neither by the words of the statute nor the intent of the Submerged Lands Act.

First, it is clear from the words of section 1313, from its legislative history and from other provisions of the Act that the validity of the United States' claims under section 1313 are to be decided in accordance with applicable state law. For example, one clause of section 1313 excepts "all . . . land, together with all accretions thereto, title to which has been lawfully . . . acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State . . . ." This clause contemplates that state law will decide whether the United States lawfully acquired land, as well as whether any additions to the shoreline constitute "accretions" thereto. Under California law, the United States would not acquire such additions to the shoreline if they were directly caused, as here, by the works of man. Supra, p. 7. Indeed, the Solicitor General has opined that the high-water mark boundary of tidelands is determined ". . . in accordance with established real estate law." See 42 Op.Att'yGen. at 261 (1963). This "established real estate law" is state law and was not

affected by the enactment of the Submerged Lands Act. *Corvallis,* 429 U.S. at 371, n. 4.

That state law was intended by Congress to give content to the term "accretions" is also apparent from the legislative history. Hearings in Executive Session, Sen. Comm. on Int. and Insular Aff. on S.J. Res. 13, etc., 83d Cong., 1st Sess. 1420-1421, 1424 (1953).[8] Any other result would cause the primary purpose of the Submerged Lands Act, to restore to the States what they thought they owned prior to 1947, to be defeated by the Act's exceptions. This conclusion is reinforced by 43 U.S.C. section 1311(a), which provides that title is confirmed in persons (including a State, 43 U.S.C. § 1301(h)) who are entitled thereto under State law. Congress did not intend that the confirmations under the Act were to be determined by one rule and the exceptions under another. Nor did Congress intend to create new, uncharted substantive property rights in the United States by section 1313, that could conflict with rules of property that had grown up in the States prior to the 1947 California decision. 99 Cong. Rec. 2619 (1953) (remarks of Sens. Holland and Cordon).

The United States' final contention is that the section 1313 exceptions to the Submerged Lands Act reflect a congressional interpretation of the "disclaimer clause" in

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[8]In discussing what later became section 1313, Senator Kuchel gave an example of certain lands in Long Beach which the United States was occupying either with or without authority. Senator Kuchel stated: ". . . the question of whether there is an occupancy with right or without right is entirely a matter to be determined under the law of the State of California." *Id.* at 1420.

California's Act of Admission[9] as encompassing future accretions to United States "public lands." U.S. Br. at 17. This argument begs the question. Of course, California cannot interfere with the disposal of "public lands." The question is whether the subject land *is* public land.

Even conceding the "submerged lands" argument of the United States, it has been held by the courts and recognized by the United States that submerged lands are *not* "public lands." *Justheim v. McKay,* 229 F.2d 29, 30 (D.C. Cir. 1956), affirming 123 F.Supp. 560, 568 (D. D.C. 1954), *cert. den.,* 351 U.S. 933 (1956); Hearing Before the Sen. Comm. on Int. and Insular Affairs on S.J. Res. 195, 81st Cong., 2d Sess. 6 (testimony of Mastin G. White, Solicitor, Department of Interior); 40 Op.Att'yGen. 540 (1947). And Congress cannot interfere with basic sovereign attributes of the States such as the State's title to its tidelands or its right to apply state law to decide disputes over sovereign land boundaries. See *Withers v. Buckley,* 61 U.S. (20 How.) 84, 92 (1857); *Coyle v. Oklahoma,* 221 U.S. 559, 570-573 (1911); *National League of Cities v. Usery,* 426 U.S. 833, 845 (1976); *California v. United States,* 512 F.Supp. 36, 45 (N.D.Cal. 1981); Cal. Br. at 11-12. This argument also must fail.

Thus, the section 1313 exception does not encompass this case. Under established California law, deposition artificially caused is not "accretion," and inures not to the

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[9]The State ". . . shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the same shall be impaired or questioned . . ." Act of September 9, 1850, § 3, 9 Stat. 452.

upland owner but to the State. Indeed, in *United States v. California,* 381 U.S. 139, this Court specifically held that such artificially made land belongs to the State despite contrary claims by the United States.[10] *Id.* at 176-177.

III

THE POST-STATEHOOD HIGH-WATER BOUNDARY OF STATE SOVEREIGN LANDS IS, AS A MATTER OF CONSTITUTIONAL PRINCIPLE, SOLELY THE PROVINCE OF STATE LAW; THE UNITED STATES' CONTENTION THAT THERE IS A "FEDERAL CONSTITUTIONAL RULE" GOVERNING SUCH BOUNDARY IS UTTERLY WITHOUT SUPPORT.

Ignoring over 135 years of case law just recently reaffirmed, Cal. Br. at 11-18, the United States argues as if *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313 (1973), had not been overruled by *Corvallis.* The United States contends that *Pollard* established a "federal constitutional rule" of navigable water boundaries that, after statehood,

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[10]In *United States v. California,* 381 U.S. at 177, the Court noted and specifically rejected the United States' argument, U.S. Br. at 18, that California would "have its cake and eat it too" by gaining title to both the artificially made depositions and any consequent "bulge" produced in the three-mile boundary between the United State's submerged lands and those of California. In response to the Court's recognition that the United States could protect itself against such "inequity" through its power over navigable waters, *United States v. California,* 381 U.S. at 177, the United States issued a specific regulation concerning just such situations. 33 C.F.R. § 320.4(f). Indeed, the United States has required California to waive its claim to a "bulge" resulting from an artificial extension of the coastline. See Cal. Stats. 1969, Ch., 1044, p. 2028. In this particular case, no bulge will be produced. The three-mile boundary is calculated from a point further seaward of the subject land. Cal. Br. at 17.

governs the boundaries of sovereign land received under the Equal-Footing Doctrine. U.S. Br. at 11-12, 16, 22. The United States also argues that this rule was affirmed by the Submerged Lands Act and that *Corvallis* was a *change* in the law which the Submerged Lands Act, enacted prior to *Corvallis,* could not contemplate. *Ibid.*

To reiterate, federal law determines *only* the original boundary between sovereign land which inured to the State pursuant to the Equal-Footing Doctrine and the abutting upland. After statehood, conflicts over the title to and boundaries of State sovereign land are decided by state law. Cal. Br. at 11-12. This right is constitutionally founded, court ratified and congressionally confirmed. *Ibid.*

The breathtaking contention of the United States stands the law on its head. There is no credible authority for the novel proposition that *Pollard* established a "federal constitutional rule" of ambulatory water boundaries for Equal-Footing Doctrine lands. None is cited. In fact, the authorities are exactly the other way.

The effect of post-statehood physical movement of the high-water line on land title has consistently been held a matter of state law. E.g., *Pollard,* 44 U.S. (3 How.) at 229-230; *Barney v. Keokuk,* 94 U.S. 324, 337-38 (1876); *Joy,* 201 US. at 340, 343; *Arkansas v. Tennessee,* 246 U.S. at 175-176 (reciting the ". . . familiar doctrine that it is for the States to establish for themselves such rules of property as they deem expedient with respect to navigable waters within their borders and the riparian lands adjacent to them.") And, although the very contention made here by the United States was erroneously adopted in *Bonelli,* 414 U.S. at 318, it was shortly thereafter expressly re-

jected by *Corvallis*, 429 U.S. at 372-378, 381-382. *Corvallis* specifically noted that the application of state law to decide property boundary disputes had been adhered to "from 1845 until 1973 [Bonelli]." *Id.* at 381.

In fact, not only has state law always decided such boundary disputes, but there is no "federal constitutional rule" regarding "accretion" or any other aspect of shoreline movement in other than interstate boundary cases. E.g., *id.* at 380-381; *Texas Industries, Inc. v. Radcliffe Materials*, 101 S.Ct. 1784, 1790 (1981).

There is no reason that State law should not govern the decision as to the location of the high-water mark upland boundary in this case. The United States has conceded that state law governs the high-water mark boundary in "inland waters". And there is no reason articulated by the United States that makes open coast tidelands any different.

Given the evenhanded application of state law, the mere fact that the United States is an adjoining land owner is not a sufficient reason to cause application of federal law to decide boundary disputes. *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 673 (1979). A rule such as California's, which holds that gradual, but artificial, additions to upland fix the boundary, does not affect the sovereign interests of the United States any more than does the doctrine of avulsion, which also fixes the boundary. And the United States concedes that, even under its chimerical "federal constitutional rule," avulsive changes fix the boundary of federal upland. U.S. Br. at 11.

Finally, in coastal boundary cases such as this there are no international relations implications in establishing the high-water mark. Cal. Br. at 15-17. Thus, there is no basis on which to apply or create federal law.

A holding that there is a post-statehood "federal constitutional rule" regarding "accretion" and other aspects of shoreline movement would bring into the federal courts a whole body of litigation that until now has been pursued in the state courts. Surely federal courts are not now to be burdened with private boundary and title disputes.

Thus, the Court should heed the admonition in *Corvallis* that a State's title to its sovereign land ". . . vests absolutely as of the time of its admission and is not subject later defeasance by operation of any doctrine of federal common law." *Corvallis*, 429 U.S. at 371. Creation of a federal common law rule to decide the effect of events that occurred forty years after statehood would manifestly violate that admonition.

CONCLUSION

California urges this Court to grant its motion for summary judgment and deny the United States motion for judgment on the pleadings.

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Respectfully submitted,

GEORGE DEUKMEJIAN
Attorney General of the State of California
N. GREGORY TAYLOR
Assistant Attorney General
DENNIS M. EAGAN
BRUCE S. FLUSHMAN
Deputy Attorneys General

DENNIS M. EAGAN

BRUCE S. FLUSHMAN
Attorneys for Plaintiff

State of California
Department of Justice
George Deukmejian
(PRONOUNCED DUKE-MAY-GIN)
Attorney General

350 McALLISTER STREET
SAN FRANCISCO 94102
(415) 557-2544

(415) 557-1152

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SUPREME COURT, U.S.

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Alexander L. Stevas
Clerk of the Supreme Court
United States Supreme Court
One First Street N.E.
Washington, D.C. 20543

Re: California v. United States,
No. 89, Original

Dear Mr. Stevas:

Plaintiff, State of California, is advised that the United States will seek, by motion, leave of Court to file a supplemental brief in this action. California is also informed that the basis for such motion will be the contention that California's Reply Brief contained new or substantially new matter.

California does not agree with this contention. California's Reply Brief does not contain any matters that have not already been set forth in its Opening Brief, except such matters that were necessarily responsive to arguments made by the United States in its Opening Brief. However, as the United States believes it necessary to more adequately set out its position, California has no objection to the United States' motion.

For its part, California does not believe it necessary to file a supplemental brief in response to the United States' Reply Brief. However, California may wish to file a further brief once it has had the opportunity to consider the United States' final brief, should leave to file a brief be granted.

I would greatly appreciate it if you would circulate this letter to the members of the Court in connection with the conference at which the United States' motion for leave to file supplemental brief is considered. I have included a copy for each member of the Court.

Respectfully submitted,

GEORGE DEUKMEJIAN
Attorney General

Bruce S. Flushman

BRUCE S. FLUSHMAN
Deputy Attorney General

BSF:mdm
cc: Louis F. Claiborne

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF CALIFORNIA, EX REL.,
STATE LANDS COMMISSION,
Plaintiff

vs.

No. 89, Original

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF by first class mail February 25, 1982 to:

BRUCE S. FLUSHMAN, ESQ.
Deputy Attorney General
6000 State Building
San Francisco, California 94102

February 25, 1982

REX E. LEE
SOLICITOR GENERAL

DOJ

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No. 89, Original

In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF CALIFORNIA EX REL.
STATE LANDS COMMISSION, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON CROSS-MOTIONS FOR JUDGMENT

REPLY BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

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REPLY BRIEF FOR THE UNITED STATES

We must candidly confess that we do not fully understand California's submission. It is not clear to us whether the State is claiming the parcel at issue because it was once wholly submerged, or submerged at high tide, or because it is now upland. Nor are we sure whether the claim is founded on the *Pollard* doctrine, as construed in *Corvallis*, or on the Submerged Lands Act. And, finally, we cannot be certain whether California advances distinct or identical arguments with respect to the former seabed and the former foreshore or tidelands. In the circumstances, we confine ourselves to identifying the most obvious flaws in the State's submission.

A. *The Former Submerged Lands*

1. The State persists in labelling "sovereign lands" areas of the former seabed of the Pacific Ocean, permanently submerged at statehood and for half a century thereafter. This assertion is apparently independent of the Submerged

Lands Act which, in California's view, merely "confirmed [an] already conferred title." Cal. Br. 10.

As we have already pointed out (U.S. Br. 8-9), this Court's decisions—including *United States* v. *California*, 332 U.S. 19 (1947)—stand firmly in the way of that submission. It is no good quibbling about the exact character of the *federal* interest in the seabed below the low-water line (Cal. Br. 15-16 & n.16, 28-29 & n.22). Whatever else was decided, the first *California* case and its progeny squarely held that the *Pollard* doctrine does *not* apply to the open seabed (*e.g.*, 332 U.S. at 31-39) and the State has *no* interest therein. See para. 1 of the Decrees entered in the first *California*, *Louisiana* and *Texas* cases, 332 U.S. 804, 805 (1947); 340 U.S. 899 (1950); 340 U.S. 900, 911 (1950). It follows that, so long as they underlay the Pacific Ocean seaward of the low water line, the lands in suit were not "sovereign lands" of California.

2. The only question is whether the Submerged Lands Act of 1953 conveyed title to these lands to California, although, by then, they were no longer submerged or tidelands. We have fully explained why that statute could not, and did not attempt to, "overrule" the Court's constitutional holding that the seabed off the open coast did not inure to the States at statehood (U.S. Br. 8-10), and, with one exception, did not convey land long since emerged from the sea (*id.* at 10-20). On these points, we have nothing to add. Indeed, California seems to agree that the Submerged Lands Act granted only an ambulatory title, shifting as the actual limit of the sea changes from time to time, regardless of cause. See Cal. Br. 16-17, 28-29, 31.

The State appears to base its Submerged Lands Act claim on the exceptional rule that confirms State title to former submerged lands which had lost that character only because they had been "filled in, made or reclaimed." 43 U.S.C. 1301(a)(3). See Cal. Br. 24-27. This is a novel argument, wholly inconsistent with the agreed facts. See U.S. Br. 13-15

& n.5. Obviously enough, the cited provision reaches only lands deliberately appropriated from the sea by the act of man, not natural accretion indirectly traceable to some artificial construction built for a wholly discrete purpose.

At all events, however, treating the formerly submerged acreage as "made land" does not aid California. Indeed, as we have noted (U.S. Br. 16-17 & n.6), Section 5(a) of the Submerged Lands Act, 43 U.S.C. 1313(a), expressly withholds from the grant to the States all "accretions" to lands reserved by the United States, as well as "all lands filled in, built up, or otherwise reclaimed by the United States for its own use." Although the terms are not identical, it is safe to assume the two provisions (43 U.S.C. 1301(a)(3) and 43 U.S.C. 1313(a)) embrace the same character of artificial extensions of the mainland. The apparent congressional objective was to assure each sovereign the continuing benefit of land fill and like work accomplished by each. Although we believe both provisions inapplicable in the present factual setting, it is clear they cancel each other when the United States is the upland owner and is responsible for causing the extension into the sea.

3. We conclude, as before (U.S. Br. 7, 15, 19-20), that California's claim to such part of the disputed parcel as was once submerged seabed has nothing whatever to do with *Bonelli, Hughes, Corvallis* or *Wilson*. No decision of this Court remotely condones California's attempt to encroach on the federal domain by labelling as "State sovereign lands" an area which the United States reserved to itself and never relinquished. It is simply frivolous to assert that any rule of State law can expand the Constitutional grant under the Equal Footing Doctrine or the Congressional grant effected by the Submerged Lands Act.[1] Of course, each

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[1]We have assumed that California law would deny to the upland proprietor the benefit of accretion resulting indirectly from artificial

State is free to regulate the disposition of its "sovereign lands" as it sees fit (Cal. Br. 11). But State sovereignty includes no power to appropriate lands appertaining to the United States which, as a matter of federal law, are retained by the Nation.

B. *The Former Tidelands*

While wholly ignoring the relevance of the first *California* case to former submerged lands, the State invokes that decision as recognizing its claim to offshore tidelands—the area between the high and low water lines. See Cal. Br. 16, 29-30. Because of that difference, it is open to California to assert that the presumably small strip of former tidelands forming part of the contested parcel—unlike the formerly submerged seabed—was, at one time, "sovereign State land." But, even if that is conceded, it does not follow that California's title survived the geographical change which converted that area into upland.

In the absence of any rebuttal, we need not here repeat our submission with respect to the present status of these former tidelands. See U.S. Br. 20-24. Instead, we take the occasion to join California in urging against any ruling that would produce "a Linzer torte scheme of ownership" along the coast (Cal. Br. 31). We have ourselves made the same point (U.S. Br. 24), and have suggested how that result can be avoided by treating both the former submerged lands and the former tidelands as accretions to the adjoining federal upland.

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causes. That is certainly the general State law rule. See *People* v. *Hecker*, 179 Cal. App. 2d 823, 837-842, 4 Cal. Rptr. 334, 343-346 (1960). But it is not clear that the California courts would seek to apply it where the United States—or even a grantee from the United States—is the upland proprietor. Indeed, the landmark decision, *Carpenter* v. *City of Santa Monica*, 63 Cal. App. 2d 772, 147 P.2d 964 (1944), expressly recognizes that *federal* law controls where title is in or derives from the United States. 63 Cal. App. 2d at 784, 147 P.2d at 970.

For the reasons stated here and in our opening brief, the Motion of the United States should be granted, the Motion of California denied, and judgment entered quieting the title of the United States to the lands described in the Complaint.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

FEBRUARY 1982

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No. 89, Original

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1981

STATE OF CALIFORNIA, ex rel. STATE LANDS COMMISSION,

Plaintiff,

-VS-

UNITED STATES OF AMERICA,

Defendant.

ON CROSS-MOTIONS FOR JUDGMENT

BRIEF OF AMICI CURIAE STATES OF WASHINGTON, ALABAMA, ALASKA, ARIZONA, HAWAII, NEW MEXICO AND OREGON

KENNETH O. EIKENBERRY,
Attorney General,

MALACHY R. MURPHY,
(Counsel of Record)
Deputy Attorney General,

ROBERT C. HARGREAVES,
Assistant Attorney General,

Temple of Justice
Olympia, Washington 98504
Telephone (AC 206) 753-2552

Attorneys for State of Washington

February, 1982

(List of Additional Counsel on Inside Cover)

STATE PRINTING PLANT 3 OLYMPIA, WASHINGTON

TANY S. HONG
Attorney General
JOHNSON H. WONG
Deputy Attorney General
335 Merchant Street
Room 214-B Old Federal Building
Honolulu, Hawaii 96813
Telephone (AC 808) 548 8940
Attorneys for State of Hawaii

JEFF BINGAMAN
Attorney General
J. SCOTT HALL
Special Assistant Attorney General
P.O. Box 1148
Santa Fe, New Mexico 87501
Telephone (AC 505) 827-2743
Attorneys for State of New Mexico

DAVE FROHNMAYER
Attorney General
PETER HERMAN
Sr. Assistant Attorney General
100 State Office Building
Salem, Oregon 97310
Telephone (AC 503) 378-6368
Attorneys for State of Oregon

CHARLES A. GRADDICK
Attorney General
SARAH M. SPRATLING
Assistant Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130-1601
Telephone (AC 205) 834-5150
Attorneys for State of Alabama

WILSON L. CONDON
Attorney General
G. THOMAS KOESTER
Assistant Attorney General
Pouch K — State Capitol
Juneau, Alaska 99811
Telephone (AC 907) 465-3600
Attorneys for State of Alaska

ROBERT K. CORBIN
Attorney General
ANTHONY B. CHING
Solicitor General
1275 West Washington
Phoenix, Arizona 85007
Telephone (AC 602) 255-4266
Attorneys for State of Arizona

QUESTIONS PRESENTED

(1) Does federal common law exist and, in derogation of both state law and the equal-footing doctrine, determine title to accretions formed since statehood (whether by natural or artificial means) to ocean front tidelands?

(2) Should *Hughes v. Washington*, 389 U.S. 290 (1967), be overruled?

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STATE OF CALIFORNIA, ex rel. STATE LANDS COMMISSION,

Plaintiff,

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ON CROSS-MOTIONS FOR JUDGMENT

BRIEF OF AMICI CURIAE STATES OF WASHINGTON, ALABAMA, ALASKA, ARIZONA, HAWAII, NEW MEXICO AND OREGON

STATEMENT OF THE CASE

This is a quiet title action between the State of California and the United States. The case is before the court as an original action under the jurisdiction conferred by Article III, § 2 of the Constitution and 28 USC § 1251(b). This *amici curiae* brief of the States of Washington, Alabama, Alaska, Arizona, Hawaii, New Mexico, and Oregon is submitted in support of the position taken by California.

Amici have taken the liberty of rephrasing the "Questions Presented" in order to more accurately reflect their view of the nature of the issue for decision. As phrased by California (Ca. Opening Br., p. i) the question

stated the underlying issue but is couched in narrow terms stemming from the facts of the case. The United States' version of the question (Br. of United States, p. (I)) assumes the answer on a faulty premise based on the Submerged Lands Act[1] (see discussion *infra*, pp. 7-10).

The property involved in this lawsuit is accretion[2] land on the Pacific Ocean coast situated just north of the mouth of Humboldt Bay in Northern California. The United States owns the adjacent uplands, which are administered as a Coast Guard Reservation. The dispute is over the question of ownership of the accretions; there is no material controversy over how or when the accretions were formed.[3] Since the relevant factual background of this case is adequately developed in the briefs of the parties, it will not be restated here.

California contends that at the time of its admission to statehood it was, as a sovereign state, vested with title to the beds underlying the navigable waters of its coastal tidelands, including those abutting on uplands in which title was retained by the United States. Thereafter, the state argues, as a littoral owner the United States' title to alluvion vis-a-vis California's as owner of the beds of the adjoining tidelands was subject to determination under applicable rules of *state* property law.[4]

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[1]Act of May 22, 1953, Title II, § 3, 67 Stat. 30 (43 USC § 1301 *et seq.*).

[2]Throughout this brief, the terms "alluvion" and "accretion" are used to refer to land built up by the physical process of gradually accumulating sedimentary deposits.

[3]California characterizes the accretions as having been formed artificially by virtue of the construction of a jetty on the north side of the entrance channel to Humboldt Bay. Ca. Opening Br., pp. 4-5. The United States, on the other hand, characterizes the accretions as having been formed by natural processes, albeit directly related to the construction of the jetty. Br. of United States, pp. 3, 5, 6. The United States does not, however, suggest that this is a distinction with any bearing on the outcome of the case. Nor should it be; see footnote 4, *infra*.

[4]Under the facts as characterized by California (i.e., artificially created accretion lands), title to the disputed accretion lands is in the state. *Carpenter v. City of Santa Monica*, 63 Cal.App.2d 772, 147 P.2d 964 (1944). In Washington, the same result would follow irrespective of whether the accretions were formed naturally or artificially. *Hughes v.*

The United States, on the other hand, first sidesteps California's position by ignoring the constitutional force and effect of the equal-footing doctrine (discussed *infra*). And then, it postulates a strained application of the Submerged Lands Act which ignores physical reality and, if followed, would produce an untenable hiatus in the law.[5]

California properly portrays this action as impinging on vital attributes of its sovereignty, and those attributes are of no less critical importance to *amici*. California also correctly characterizes this case as the vehicle by which the Court should critically review its decision in *Hughes v. Washington*, 389 U.S. 290 (1967) and, in turn, overrule *Hughes* on the basis of *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977). The United States, however, expressly disclaims any need to reexamine *Hughes*. Br. of United States, pp. 16, 19-20.

INTEREST OF *AMICI*

Amici join with California in urging the Court to ring the long-overdue death knell for *Hughes*. Those states should be free, once again, to follow the mandate of their public trusts on ocean beaches, such as public recreation,[6] or to pursue other diverse proprietary interests. *Hughes* frustrates those purposes and casts a cloud on the title to state sovereign lands, as well as the validity of the title of many state grantees.[7]

The advancement of their sovereign rights, as well as the protection of their rights of ownership to similarly sit-

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State of Washington, 67 Wn.2d 799, 410 P.2d 20 (1966), rev. *sub. nom. Hughes v. Washington*, 389 U.S. 290 (1967).

[5]See footnote 12, *infra*.

[6]*See, e.g.*, Revised Code of Washington 43.51.650-.685 (Seashore Conservation Act).

[7]In Washington, for example, since statehood there have been 25,021 sales of state owned tide and shore lands, many of which have been along the ocean beaches and to those other than the adjoining upland owner. Records of Tideland and Shoreland Deeds, Office of the Commissioner of Public Lands, Olympia, Washington.

uated land constitute the interest of *amici* in this case.[8]

SUMMARY OF ARGUMENT

When California was admitted to the Union it was (as was true of any new state) vested absolutely with title to the beds and shores of its navigable waters and tidelands by virtue of its constitutional right to stand on an equal footing with the original 13 colonies. The operation of the equal-footing doctrine extends to all tidelands and navigable waters within the boundaries of a state, without any distinction between inland and coastal tidelands.

A state's title to those tidelands acquired under the equal-footing doctrine is, of course, always subject to the paramount power of Congress to control the waters lying over such lands for purposes specifically reserved to the federal government in the constitution, such as commerce among the states and with foreign nations. But, even where the United States had acquired title to property prior to the creation of a state, the beds and shores of tidal and navigable waters were held in trust for the future state. The title in such lands which otherwise would pass to the state under the equal-footing doctrine could be defeated only by a prior conveyance by the United States in performing international obligations, or under the most exigent circumstances, in using or improving the lands for purposes of commerce or other appropriate public purposes for which the property was held.

Here, however, the United States did not at any time prior to California's admission to the Union convey title to the tidelands involved in this action, i.e., those now abutting the Coast Guard site. Title to those tidelands was thus vested absolutely in California on the date of statehood in 1850. The only function of federal law is to

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[8]The trial court in which *Hughes v. Washington*, 389 U.S. 290 (1967), arose has held that *Hughes* was overruled by *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), leaving the questions of title to ocean front accretions in Washington to be resolved by application of state law. *Bay Haven Associates, et al. v. State of Washington*, Pacific County Superior Court No. 20386 (May, 1981), on appeal to the Supreme Court of the State of Washington, docket No. 48090-7 (appeal stayed pending the outcome of the instant case).

determine the extent of the landward limit of the property thus acquired; i.e., the location of the high water line which, at the time of statehood, served as the boundary between the state's tideland ownership and the United States' upland holding.[9] In other words, federal law answers the question of how much property was acquired under the equal-footing doctrine, and state law then controls so that, thereafter, the legal interest of the United States as a littoral owner (including its right to acquire title to alluvion deposited by accretion seaward of its property) is entirely a state law matter. In short, California's absolute title to the subject tidelands was fixed and vested in 1850 as an element of state sovereignty as was its right to determine and apply state law to questions of land title subsequently arising by virtue of physical changes to those tidelands. This element of state sovereignty may be subjugated only where some counterveiling and overriding principle of federal law requires state law to be displaced.

Finally, transcending each state's interest in preserving its constitutional sovereign prerogatives over its own lands is its legitimate concern with the reasoned application of traditional concepts of federalism. There is no valid and well founded reason to create and apply federal common law to determine the title to the accretions in this case or in any other case involving ocean front property. *Hughes v. Washington, supra,* should be overruled, and California should prevail under the application of its own state law.

ARGUMENT

When the original 13 colonies first formed the Union they succeeded entirely to the title previously held by the English Crown in the beds underlying the navigable waters within their boundaries subject only to those rights surrendered by the constitution. *Martin v. Waddell,* 41 U.S. (16 Pet.) 367, 410 (1842). Likewise, under the equal-footing

[9]The same would be true for the purpose of determining the seaward extent of the state's holding, be that a low water line, or some point yet further seaward. That facet of the situation, for present purposes however, is quite irrelevant.

doctrine, this Court has long held that new states subsequently admitted to the Union obtained the same ownership of those underlying shorelands and tidelands. *Id.* at 410; *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845); *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423, 436 (1867); *Shively v. Bowlby*, 152 U.S. 1, 49 (1894); *State Land Board v. Corvallis Sand & Gravel Co., supra*; 429 U.S. at 370; *Montana v. United States*, 450 U.S. 544, 551 (1981). The purpose of this rule was and is, of course, to insure that new states have all rights, sovereignty and jurisdiction within their respective borders on an equal footing with the original states. *Mumford v. Wardwell, supra.* The court has referred to this condition of equality as an inherent attribute of membership in the Federal Union. *Illinois Central Ry. Co. v. Illinois*, 146 U.S. 387, 434 (1892).

A state's title to the beds of navigable waters under the equal-footing doctrine is not conferred by Congress but, rather, by the constitution itself. *Pollard's Lessee v. Hagan, supra.* At the time of a state's admission to the Union that title vests absolutely. *State Land Board v. Corvallis Sand & Gravel Co., supra.* It is not subject to later defeasance by operation of any doctrine of federal common law. *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498 (1839); *Weber v. Harbor Comm'rs*, 85 U.S. (18 Wall.) 57 (1873). Nor is it subject to divestiture by any act of Congress. *Pollard's Lessee v. Hagan, supra.*

The only qualifications or restrictions on the state's title acquired under the equal-footing doctrine are those imposed by the paramount rights granted to the United States by the constitution, *id.*, such as a navigational servitude in favor of the federal government for regulating and improving navigation and commerce between the states and with foreign nations. *Gibson v. United States*, 166 U.S. 269 (1897). And the only exception to a state's obtaining such title upon admission to the Union exists where, prior to statehood, the federal government conveyed title to the beds underlying navigable waters of a territory in furtherance of international duties, or some other exceptional circumstances attendant upon carrying

out the purposes for which the territory was held. *United States v. Holt Bank*, 270 U.S. 49, 54 (1926). However, the policy is strong in favor of regarding all lands acquired by the United States during the territorial period as being held in trust for the benefit of future states. *Shively v. Bowlby, supra*, 152 U.S. at pp. 49, 57-58. Only on very rare occasions has a pre-statehood federal conveyance been found to defeat the later vesting of title to the beds of navigable waters in a state. Compare *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), with *Montana v. United States, supra*, and *United States v. Holt Bank, supra*.

In the instant case, upon its admission to the Union in 1850, California was vested with absolute, sovereign title to the tidelands fronting on the property held by the United States. *E.g., State Land Board v. Corvallis Sand & Gravel Co., supra*. There was no conveyance of the tidelands prior to statehood; and it was not until 1859 that any of the uplands were withdrawn from the public domain. The only restrictions or qualifications on California's absolute property ownership stemmed from the federal government's paramount constitutional powers to control navigation and commerce on the overlying waters. *Id.; Pollard's Lessee v. Hagan, supra*.

The United States would have this Court believe, however, that for some unexplicable reason the equal-footing doctrine does not operate to vest title in a state to the lands underlying its tidal waters along the open sea coast. While it is true that this may never have been a question previously put squarely to the Court for decision, the cases are nevertheless replete with every conceivable indication that the doctrine does in fact apply to tidelands along the ocean. They consistently refer to the tidelands encompassed by operation of the doctrine in such all inclusive terms as "* * * absolute right to all their navigable waters, and the soils under them * * *," *Martin v. Waddell, supra*, 41 U.S. (16 Pet.) at p. 410; "* * * all soils under the tidewaters within her limits * * *," *Weber v. Harbor Comm'rs, supra*, 85 U.S. (18 Wall.) at pp. 65-66; "* * * riparian or littoral proprietors * * *" (in respect to their property rights vis-a-vis the state), *Pol-*

lard's Lessee v. Hagan, supra, 152 U.S. at pp. 57-58.[10]

In *United States v. Texas,* 339 U.S. 707 (1950) the Court said, at pp. 717-719

> * * * Texas prior to her admission was a Republic. We assume that as a Republic she had not only full sovereignty over the marginal sea but ownership of it, of the land underlying it, and of all the riches which it held. * * * When Texas came into the Union, she ceased to be an independent nation. She then became a sister State on an "equal footing" with all the other States. That act concededly entailed a relinquishment of some of her sovereignty. * * * In external affairs the United States became the sole and exclusive spokesman for the Nation. We hold that as an incident to the transfer of that sovereignty any claim that Texas may have had to the marginal sea was relinquished to the United States.
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> * * * as was pointed out in *United States v. California* [332 U.S. 19], once low-water mark is passed the international domain is reached.

The clear implication of this case is that Texas, on an "equal footing" with all other states, retained full sovereignty and ownership of the soils landward of the low-water mark along the open sea.

Finally, in the same vein, this Court has said that the Submerged Lands Act[11] "* * * did not alter the scope or effect of the equal-footing doctrine * * *" Rather, it "* * * confirm[ed] the States' title to the beds of navigable waters within their boundaries * * *" *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. at 371, n. 4. And the Submerged Lands Act clearly covers tidelands along the ocean. 43 USC §§ 1311(a), 1301(a)(2). Perforce, the ocean tidelands are included within the operation of the equal-footing doctrine.

The United States nevertheless goes to considerable length in its brief in an attempt to establish that the Sub-

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[10]"Riparian proprietor" refers to an owner of land which is bounded or traversed by a natural stream; "littoral proprietor" refers to owners of premises on the shores of the sea or a lake. Ballentine's Law Dictionary (3rd Ed., 1969).

[11]43 USC § 1301, *et seq.*

merged Lands Act (and hence the equal-footing doctrine) conveys only title to an ambulatory strip along the ocean that is subject to ever changing displacement landward or seaward by the forces of accretion, erosion or reliction. In so doing it relies heavily on an opinion of former Solicitor General Cox in 42 Op. Att'y Gen. 241 (1963) (interpreting various provisions of the Submerged Lands Act) but does not explain how its theory is reconciled with the clear holding in *State Land Board v. Corvallis Sand & Gravel Co., supra,* i.e., that once title vests in the beds of navigable waters the state's ownership of such lands is absolute and is not divested if those bedlands reemerge as dry land.

Tidelands along the ocean become uplands by virtue of accretion in just the same manner as might the beds underlying a navigable river. There is no distinction between the two; and no reason to treat them differently.

The United States would also ask this Court to conceptualize the accretion process which created the disputed alluvion in this case as separately exposing "former tidelands" and then, in turn, what was once the bed of the marginal sea. As to the latter, inasmuch as they became dry land and "attached to" the uplands prior to 1953, the United States asserts it has title because California did not receive title to any of the beds of the marginal sea prior to passage of the Submerged Lands Act in 1953.[12] As to the reemerged "former tidelands," the United States blithely suggests they be given to the United States to avoid a small intervening strip of state land between its larger parcels.

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[12]Assuming for the moment there is any merit in this argument, it is plainly tailored only to resolution of this case, and leaves unanswered how any post-1953 accretions might be handled. The United States hints that perhaps *Wilson v. Omaha Tribe,* 442 U.S. 653 (1979) would be controlling, and would require application of the federal common law of accretion inasmuch as the federal government has retained and never relinquished its ownership of the uplands. Aside from the fact that the effect of the equal-footing doctrine was not even addressed in *Wilson,* however, that case is completely inapposite here because in *Wilson* the federal government's "retained title" was in fact title it held in trust for the Omaha Tribe, to whom it had conveyed or "assigned" the land in question. That trust responsibility may well present a situation which

Moreover, in any event, whatever room might be left to argue the proposition that prior to 1953 the states had no title to the beds of the marginal sea under the equal-footing doctrine (*but see, State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. at p. 371, n. 4), the government's analysis remains fallacious. As the ocean receded from the federally owned uplands and alluvion was built up, the entire process took place on the tidelands as the tidelands themselves moved westward. The marginal sea remained forever seaward of those tidelands, and if there is any ambulatory nature to the title conveyed by Congress in the Submerged Lands Act, that is it. There is nothing ambulatory about the nature of the title to the tidelands vested in California under the equal-footing doctrine. *Id,* at pp. 370-371. The disposition of the present tidelands, and those former tidelands (now uplands by virtue of accretion) as far inland as the state's title was vested at statehood, is entirely a matter left to state law, barring the presence of any federal principle requiring displacement of the state law. *State Land Board v. Corvallis Sand & Gravel Co., supra,* and cases cited therein.

Finally, implicit in the United States' position is the argument that the federal government, as a pre-statehood upland littoral owner, should somehow be accorded different treatment than private proprietors as respects the operation of the equal-footing doctrine. This notion, however, simply does not withstand scrutiny. As the Court said in *United States v. Texas, supra,* 339 U.S. at pp. 719-720

> The "equal-footing" clause * * * prevents a contradiction of sovereignty [*Pollard's Lessee v. Hagan, supra*] which would produce inequality among the States.

None of the land in the original 13 colonies was owned by the United States prior to formation of the Union so none of the lands bordering on the navigable waters of those colonies could possibly have been retained by the United

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precludes deference to state law in furtherance of paramount federal interests totally unlike the instant situation. *Id.; see also* 43 USC § 1313(b).

States prior to their statehood. Therefore, it will readily be seen that to allow the United States relief from the effect of the equal-footing doctrine in any of the later states (see, Br. of United States, pp. 16-17, and n. 6) would produce an irrational contradiction in sovereignty among the states.

In summary: the preceding argument has shown that California was vested with fixed, sovereign title in the tidelands abutting the federally owned uplands on the date of its admission to the Union. Any disposition of that property, including accretions thereto, is governed by state law thereafter, unless overriding principles of federal concern dictate otherwise. Since the United States is in no different position than a private littoral owner whose title derives from a pre-statehood patent (absent special circumstances such as holding land in trust for Indians[13]) the same rule applies as that which pertains to questions of title to ocean front accretions abutting such private holdings. See *Hughes v. Washington, supra.*

With that in mind we turn, now, to *Hughes v. Washington, supra.* There the Court held that title to ocean beach accretions would be decided on the basis of federal common law based on its reasoning in *Borax, Ltd. v. Los Angeles,* 296 U.S. 10 (1935). In *Borax,* the Court applied federal law to locate the high water mark in a harbor area (unaffected by accretions), in order to fix the extent of a grant in a federal patent, and to establish the boundary between the uplands and the tidelands. The *Hughes* Court could find no reason to differentiate between boundary questions based on "the general definition of the shoreline or on a particularized problem relating to the ownership of accretion." *Hughes v. Washington, supra,* 389 U.S. at p. 292. Mr. Justice Black enunciated the Court's reason for applying federal law in *Hughes* by saying, at p. 292

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[13]*But cf., United States v. Washington,* 294 F.2d 830 (1961), which involved the question of title to ocean beach accretions along the Washington coast, where the United States held the uplands in trust for Indians. Federal law was held to apply, although based on the same reasoning derived from *Borax, Ltd. v. Los Angeles,* 296 U.S. 10 (1935) that was applied in *Hughes v. Washington,* 389 U.S. 290 (1967), a case which dealt with ocean beach accretions to privately owned uplands.

> The rule deals with waters that lap both the lands of the State and the boundaries of the international sea. This relationship, at this particular point of the marginal sea, is too close to the vital interest of the Nation in its own boundaries to allow it to be governed by any but the "supreme Law of the Land."[14]

Later, however, in *State Land Board v. Corvallis Sand & Gravel Co., supra,* the Court overruled *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313 (1973), reasoning that *Bonelli* went too far in finding, in *Borax, Ltd. v. Los Angeles, supra,* justification to apply federal common law to a question involving title to lands which once lay beneath a navigable river in Arizona. The *Corvallis* Court said, at 429 U.S., 371

> Once the equal-footing doctrine had vested title to the riverbed in Arizona as of the time of its admission to the Union, the force of that doctrine was spent; it did not operate after that date to determine what effect on titles the movement of the river might have. Our error, as we now see it, was to view the equal-footing doctrine enunciated in Pollard's Lessee v. Hagan as a basis upon which federal common law could supersede state law in the determination of land titles. *Precisely the contrary is true.* [Emphasis Supplied.]

The Court also there acknowledged that *Hughes v. Washington, supra,* had accorded *Borax* the same expansive reading as did *Bonelli. State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. at p. 377, n. 6.[15] The Court expressly declined to overrule *Hughes,* however, because "Hughes was not cited by the Oregon courts below, and in Bonelli we expressly declined to rely upon it

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[14]"Beautiful prose, but what does it mean?" Beck, *Federal Common Law and Real Property,* 47 N. Dak. L.Rev. 77, 79 (1970). "It is clear that states have complete title to the lands below the line of mean high tide. (Citation omitted) These lands, of course, are the only place where the waters 'lap both the lands of the State and the boundaries of the international sea.' (citation omitted)" *State Land Board v. Corvallis Sand & Gravel Co.,* 429 U.S. 363, 383, n. 1 (1977) (Marshall, J., dissenting).

[15]*See also* Hopp, *Federal Accretion Law,* 50 Wash. L.Rev. 777, 783, n. 36 (1975).

as a basis for our decision there. (citation omitted) We therefore have no occasion to address the issue." *Id.*[16]

The occasion to address the issue is now here. We are now squarely presented with the question of whether application of the equal-footing doctrine in *Borax, Ltd. v. Los Angeles, supra,* provides any basis to apply federal common law to the question of who owns accretions to ocean front property once the equal-footing doctrine has vested title to the tidelands in the state. And, clearly, the answer is no. For once the doctrine vests title to the tidelands in the state, it is spent. *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. at 371. *Hughes v. Washington, supra,* erred in taking the doctrine one step further to determine questions of title to accretions formed after the tidelands boundary was established and title vested in the state. Therefore it also must necessarily succumb, as did *Bonelli.*

What remains to be seen is whether there exists any reasoned principle of federal law which ought to displace state law in determining questions of title to ocean front accretions. *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. at 371. As discussed above, the mere fact that the uplands remained in federal ownership since prior to statehood provides no sound basis to apply a different rule (*supra,* pp. 10-11). As for private owners claiming a reason to apply federal common law based on the mere fact that their uplands were patented prior to statehood, that rationale has been expressly rejected by the Court. *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. at 371-372.

The only remaining rationale which has been suggested in support of the uniform application of federal common law is that offered by Justice Black in *Hughes*: the proximity to the boundaries of the international sea. This principle, weak when announced, has fallen prey to considerable criticism.[17] The boundary of the international

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[16]"* * * as the Court is certain to announce when the occasion arises, today's holding [in *Corvallis*] also overrules Hughes v. Washington (citation omitted) * * *" *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 383 (1977) (Marshall, J., dissenting).

[17]See footnote 14, *supra. See also,* Ca. Opening Br., pp. 15-17.

sea lies three miles offshore from the line of ordinary low water. 43 USC §§ 1312, 1301(c). Nothing affecting the title to accretion lands which have become dry, on-shore uplands can *in any way imaginable* touch and concern the national interests in or alter the location of the international boundary, which will always remain its prescribed distance offshore.

The fact is, applying federal law in this situation merely *creates* federal or private proprietary interests where they might not otherwise exist.[18] States in the exercise of their essential sovereignty should be free to determine if public interests in the use and disposition of state sovereign tidelands outweigh any private interest to the contrary. State law embodying those considerations should prevail in such an obvious absence of any true federal concern.

CONCLUSION

For the many reasons discussed above, *Hughes v. Washington, supra,* should be overruled, and summary judgment in this case should be granted to California, allowing it to apply the law of its own jurisdiction to this title dispute.

Respectfully submitted,

KENNETH O. EIKENBERRY,
Attorney General,

MALACHY R. MURPHY,
Deputy Attorney General,

ROBERT C. HARGREAVES,
Assistant Attorney General.

[18]Application of "(a)ny other rule [than the federal common law of accretions] would leave riparian [sic] owners continually in danger of losing the access to water which is often the most valuable feature of their property." *Hughes v. Washington,* 389 U.S. 290, 294 (1967).